COMMENTS

PROTECTING LAWS DESIGNED TO REMEDY ANTI-GAY DISCRIMINATION FROM EQUAL PROTECTION CHALLENGES: THE DESIRABILITY OF RATIONAL BASIS SCRUTINY

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INTRODUCTION

The recent creation of a public school for gay students in New York and the subsequent equal protection challenge filed on behalf of non-gay students raises doubts about whether the conventional wisdom held by many gay rights advocates—that gay people ought to be recognized as a suspect class and thus subject to strict scrutiny—remains a desirable goal today.

New York City's Harvey Milk High School[1] ("The Milk School") was established in 1985 by the Hetrick-Martin Institute ("HMI"), a grass-roots organization founded in 1979 to support gay,[2] lesbian, bisexual, transgender, and questioning youth ("GLBTQ").[3] The Milk

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[1] Harvey Milk was one of the first openly gay elected officials in the United States, and he served on the San Francisco Board of Supervisors before being assassinated by former Board member Dan White in 1978. For more information on the life of Harvey Milk, see RANDY SHILTS, THE MAYOR OF CASTRO STREET: THE LIFE AND TIMES OF HARVEY MILK (1982) (describing Milk's life and career in politics). *See also* MIKE WEISS, DOUBLE PLAY: THE SAN FRANCISCO CITY HALL KILLINGS (1984) (examining the events surrounding the assassinations of Harvey Milk and Mayor George Moscone in 1978).

[2] Throughout this Comment, my use of the word "gay," when used in the absence of the terms "lesbian," "bisexual," "transgender," or "questioning," should be assumed to encompass gay, lesbian, bisexual, transgender, and questioning youth unless specifically noted otherwise. My use of the word "gay" is not meant to belittle the meanings imputed upon names chosen by people to describe their identities, but is used because it is the term most readily used and understood to describe this collective group.

[3] Hetrick-Martin Institute: Home of the Harvey Milk High School, F.A.Q's, http://www.hmi.org/HOME/Article/Params/articles/1311/pathlist/s1036_o1222/default.aspx#item1311 (last visited Jan. 25, 2005). Although the Institute describes itself as providing services to all

School was founded in collaboration with the New York City Department of Education.[4] The school targets students that are being harassed in their community schools because of their actual or perceived sexual orientation or gender identity.[5] The school was created "to offer an alternative education program for youth that often find it difficult or impossible to attend their home schools due to continuous threats and experiences of physical violence and verbal harassment."[6]

Today, the City's Education Department oversees school administration and admissions,[7] making it the only public school of its kind in the country.[8] In 2002, the Board of Education authorized a $3.2 million expansion to triple the size of the student body (to 170 students) and increase the physical size of the school.[9] Some of the funds allocated to the expansion came from federal formula grant

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at-risk youth, it is particularly aimed at "lesbian, gay, bisexual, transgender and questioning ('GLBTQ') youth." *Id.* The mission of HMI reads:

> The Hetrick-Martin Institute (HMI), *Home of The Harvey Milk High School*, believes all young people, regardless of sexual orientation or identity, deserve a safe and supportive environment in which to achieve their full potential. HMI creates this environment for lesbian, gay, bisexual, transgender and questioning youth between the ages of 12 and 21 and their families. Through a comprehensive package of direct services and referrals, HMI seeks to foster healthy youth development. HMI's staff promotes excellence in the delivery of youth services and uses its expertise to create innovative programs that other organizations may use as models.

Id.

[4] *See id.* (describing the Education Department's involvement in the school).

[5] "Real" sexual orientation refers to those who actually identify as gay, lesbian, bisexual, or transgender. "Perceived" sexual orientation refers to those youth who are perceived by their peers, especially by their harassers, to be gay. These students may not actually be gay. Absent from the dialogue about this school is that the people at issue are teenagers who may not yet be fully aware of their sexuality. Therefore, the Milk School is potentially composed of both gay and non-gay students, even if the non-gay students currently identify as gay. *See* John Colapinto, *The Harvey Milk School Has No Right to Exist. Discuss*, N.Y. MAG., Feb. 7, 2005, at 38, *available at* http://www.newyorkmetro.com/nymetro/news/features/10970 ("Of the 100 students attending the school this year, there is apparently only one whom any of the students identify as straight.").

[6] *Id.* The New York City Department of Education describes the school's mission without any mention of the school's focus on LGBTQ youth, but rather describes the school as "creating a safe educational environment for all young people. . . . who have not felt successful in at least one other high school . . . and who want to continue their education in an alternative, small school environment." NYC Department of Education, Harvey Milk High School, http://www.nycenet.edu/OurSchools/Region9/M586/default.htm (last visited Jan. 25, 2005). For differing positions on the need for the Harvey Milk School, compare Rebecca Bethard, *New York's Harvey Milk School: A Viable Alternative*, 33 J.L. & EDUC. 417, 422 (2004) (arguing that the Milk School is necessary in order to protect gay at-risk youth) with Richard Thompson Ford, *Brown's Ghost*, 117 HARV. L. REV. 1305, 1307 (2004) (asserting that although the Milk School seeks to advance important goals, it does so at the cost of further segregating schools).

[7] Hetrick-Martin Institute: Home of the Harvey Milk School, F.A.Q's, *supra* note 3.

[8] *See* Colapinto, *supra* note 5, at 34 (referring to the Milk School as "the nation's first public school for gay and lesbian youth").

[9] Hetrick-Martin Institute: Home of the Harvey Milk School, F.A.Q's, *supra* note 3.

funds received under the Safe and Drug-Free Schools program, as provided for by the No Child Left Behind Act of 2002.[10]

Although the school is technically open to students regardless of their sexuality, the common element among the student body appears to be that the students attending the Milk School have been harassed in their traditional schools because of their sexual orientation or gender identity. This composition is implied in both the school's history and the City's discourse about the school.[11]

Students attending the Milk School enjoy a higher graduation rate, and a greater number seek higher education than the City's public schools as a whole. The Milk School reports a ninety-five percent graduation rate,[12] compared to all New York City Schools together, which graduate only fifty-eight percent of their students.[13] Sixty percent of Milk School students attend college or other additional educational programs following graduation.[14] The Milk School spends nearly $32,000 per student,[15] nearly three times more than the approximately $11,000 spent per pupil citywide.[16]

Shortly after the Department of Education announced the expanded public funding of the Milk School in 2002, New York State Senator Ruben Diaz, Sr. and a group of parents filed suit challenging the use of public funds for the Milk School.[17] Among the lawsuit's claims is that the school violates the constitutional rights of heterosexual students under the Equal Protection Clause of the Fourteenth

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[10] Safe and Drug-Free Schools and Communities Act, 20 U.S.C.A. § 7102 (West 2002) (pledging "to support programs that prevent violence in and around schools"). *See* Bethard, *supra* note 6, at 420 (describing how the No Child Left Behind Act "provides freedom for administrators to use federal funds to explore new methods of education").

[11] The school itself was established for the purpose of assisting gay at-risk youth and the organization that founded the school, the Hetrick-Martin Institute, is committed to supporting gay youth. *See supra* note 3 and accompanying text (describing the history of the school, and its focus on gay, lesbian, bisexual, and transgender students).

[12] Hetrick-Martin Institute: Home of the Harvey Milk School, F.A.Q's, *supra* note 3.

[13] *See Attrition of Students from New York Schools: Hearing Before the N.Y. S. Standing Comm. on Educ.*, 226th Legis. Sess. (2003) (statement of Walter M. Haney, Center for the Study of Testing, Evaluation and Educational Policy, Boston College), *available at* http://www.timeoutfromtesting.org/testimonies/923_Testimony_Haney.pdf (reporting New York City high school graduation rates in 2001–2002).

[14] Hetrick-Martin Institute: Home of the Harvey Milk School, F.A.Q's, *supra* note 3.

[15] *See* Colapinto, *supra* note 5, at 37 (explaining that the school received $3.2 million last year).

[16] *See* Joe Williams & Kathleen Lucadamo, *State No. 2 in School Spending*, N.Y. DAILY NEWS, Dec. 4, 2004, at 18, *available at* http://www.nydailynews.com/news/local/story/258710p-221602c.html (last visited Mar. 2, 2005) ("Right now, the city spends about $11,000 per pupil.").

[17] Diaz v. Bloomberg, No. 114533 (N.Y. Sup. Ct. filed Aug. 13, 2003), *noted in* Bethard, *supra* note 6, at 420. The Liberty Counsel and Norman Siegel, former executive director of the New York Civil Liberties Union, also support Diaz's lawsuit. *See* David M. Herszenhorn, *Lawsuit Opposes Expansion of School for Gay Students*, N.Y. TIMES, Aug. 16, 2003, at A12 (describing State Senator Diaz's lawsuit).

Amendment.[18] Despite the fact that approximately eighty percent of the Milk School's students are black and Hispanic,[19] Senator Diaz believes that black and Hispanic youth attending low-performing schools are victims of discrimination because the Milk School has a larger budget per pupil, smaller classes, as well as higher graduation rates and rates of students pursuing higher education.[20] Diaz argues that the funds "should be better used to protect all children—black, Jewish, Hispanic, Asian, Arabs—all children."[21] Additionally, students who are victims of non-sexually oriented harassment, Diaz argues, do not have a similar alternative school.[22]

The prospect of claims raised by heterosexuals challenging the constitutionality of state-sponsored programs that seek to remedy anti-gay discrimination, such as the Milk School, raise important questions about the likelihood that such benign measures will survive judicial review. For decades, conventional wisdom among gay rights advocates was that gay people were a suspect class and discriminatory legislation directed at them should receive a heightened level of judicial scrutiny. Attorneys and gay legal interest groups,[23] as well as legal

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[18] U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws."); *see* Herszenhorn, *supra* note 17, at A12 ("[T]he Harvey Milk school was set aside for too broad a class of people, violating heterosexual students' right to equal protection." (quoting Norman Siegel, former Executive Director of the New York Civil Liberties Union)); *see also* Bethard, *supra* note 6, at 420 (stating that the lawsuit also claims that the school violates the Education Department's anti-discrimination principles and is a waste of tax money).

[19] *See* Colapinto, *supra* note 5, at 37 (noting that "the vast majority of Harvey Milk's students—some 80 percent—are blacks and Latinos").

[20] *See* Bethard, *supra* note 6, at 420 ("Senator Diaz has stated he is opposed to segregation and that the funds used for the Harvey Milk School would be better spent on programs to protect all students."). Bethard suggests that Diaz perceives a school for gay students as somehow excluding black or Hispanic students. He appears to overlook the fact that the student body of the Milk School includes GLBTQ students who are black or Hispanic.

[21] Herszenhorn, *supra* note 17, at A12 (quoting State Senator Diaz) (internal quotations omitted).

[22] *See* Bethard, *supra* note 6, at 420 (stating that Diaz's suit alleges discrimination against heterosexual students). The case, which was filed in New York State Supreme Court in 2003, has not advanced since it was initiated. There is a chance that the case will be settled. The Liberty Counsel, representing the plaintiffs in the lawsuit, is allegedly in negotiations with the City. Some of the changes being sought include removal of language describing the school as a haven for LGBTQ students, as well as changes in how information is provided to guidance counselors referring students to the school. *See* Colapinto, *supra* note 5, at 39 ("It's hard to deny the validity of Senator Diaz's claim that the luxurious expansion and renovation of the Harvey Milk High School represents an inequitable distribution of city funds.").

[23] *See, e.g.*, Brief for the Petitioners at 32 n.24, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102) ("Heightened equal protection scrutiny is appropriate for laws like Section 21.06 that use a sexual-orientation-based classification."); Brief for Anti-Defamation League et al. as Amici Curiae Supporting Petitioners at 22, Romer v. Evans, 517 U.S. 620 (1996) (No. 93-1039) ("[W]e submit that any such attempt to close both political and judicial fora to claims of unconstitutional discrimination by a particular social group *renders* that group a suspect class. Amendment

scholars,[24] argued that suspect status would make it far more difficult for states and local governments to pass laws for the purpose of denying gay people those rights afforded to non-gay people.[25] If challenges to discriminatory measures were considered under heightened review rather than under traditional rational basis, the reasoning went, the Court would have greater leeway to reverse anti-gay measures.

This strategy to win suspect status for gay people was likely due in large part to the fact that so much of the legislation being passed by state and local governments prior to the 1990s included programs that explicitly discriminated against gay people or were aimed at further weakening any recognition of rights that gay people had previously achieved. Today, however, when many of the laws and programs that classify based on sexual orientation seek to *remedy* anti-gay discrimination, a reexamination is appropriate: Is heightened scrutiny for sexual orientation-based legislation still a desirable strategy for gay rights advocates?

Using the Milk School as an example, this Comment argues that rational basis review may better serve the goals of gay rights advocates

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2 thus requires strict judicial scrutiny under the Fourteenth Amendment's Equal Protection Clause."); Brief of Human Rights Campaign Fund et al. as Amici Curiae Supporting Petitioners at 4–9, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039) (arguing that strict scrutiny should be applied to equal protection challenges involving sexual orientation classifications).

[24] *See, e.g.*, Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 730–31 (1985) (reasoning that the meaning given to "discrete and insular minorities" is inadequate to protect groups such as homosexuals from prejudice); Jennifer Wriggins, *Maine's "Act to Protect Traditional Marriage and Prohibit Same-Sex Marriages": Questions of Constitutionality Under State and Federal Law*, 50 ME. L. REV. 345, 353–54 (1998) (contending that same-sex marriage is a gender-based classification that should be subject to heightened scrutiny); *see also* Seth Hilton, Comment, *Restraints on Homosexual Rights Legislation: Is There a Fundamental Right to Participate in the Political Process?*, 28 U.C. DAVIS L. REV. 445, 449 (1995) (arguing for heightened scrutiny for gays under the Equal Protection Clause); Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 797–98 (1984) (arguing for suspect classification of homosexuality under the Equal Protection Clause); John F. Niblock, Comment, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153, 158 (1993) (advocating for heightened scrutiny for anti-gay ballot measures); Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2770 (2005) ("[A]n acknowledgment by the Court of its use of a more searching form of rational basis review—a type of heightened scrutiny—for sexual orientation classifications as used in *Romer* and *Lawrence* will resolve the two unintended consequences of those cases."); Mark Tanney, Note, *The Defense of Marriage Act: A "Bare Desire to Harm" an Unpopular Minority Cannot Constitute a Legitimate Governmental Interest*, 19 T. JEFFERSON L. REV. 99, 129 (1997) ("There is a strong argument that gays and lesbians belong to such a 'suspect class.' This designation would be helpful to proponents of gay rights because laws that discriminate against gays would be subjected to strict judicial scrutiny."); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1297–99 (1985) (arguing for suspect classification of homosexuality under the Equal Protection Clause).

[25] *See supra* notes 23–24 (citing examples of arguments in support of suspect status for gay people).

than would application of heightened scrutiny.[26] Twenty years ago, in *Bowers v. Hardwick*,[27] the Supreme Court upheld the criminalization of same-sex sodomy under rational basis review. Today, however, although some anti-gay legislation—especially related to gay marriage—remains, many states and municipalities are passing measures granting civil rights protections to gay people in other areas. Because there is a presumption of constitutionality when the Court reviews state regulations of non-suspect groups, benign legislation is likely to withstand rational basis scrutiny so long as there is a legitimate state interest for its passage—such as remedying discrimination against gay people.

Through an examination of the Milk School as a type of benign state-sponsored program meant to remedy discrimination faced by gay students, I analyze why such a state-sponsored program would withstand rational basis scrutiny—even one in which non-gay students were explicitly excluded from admittance. In contrast, because of the Court's application of heightened scrutiny to benign programs meant to remedy discrimination against existing suspect classes, remedial programs like the Milk School would most likely fail under strict scrutiny.

Although anti-gay measures are more likely to be struck down under strict scrutiny, the Court has substantially cut back on what qualifies as a legitimate state interest since the rational basis standard was described in *Williamson v. Lee Optical of Oklahoma, Inc.*[28] The Court's rejection of private prejudice and moral disapproval as legitimate state interests in *Romer v. Evans*[29] and *Lawrence v. Texas*[30] suggest that very few pieces of legislation *excluding* gay people from legal protections should withstand rational basis review because states will so rarely have more than moral disapproval on which to base an interest. Therefore, the need for suspect class status is less necessary today than it was prior to these decisions.

The time when suspect status was most desirable may have passed. The movement for equal rights for gay people is at a crossroads today, and because so much benign legislation is coming out of state and local governments, the maintenance of these advances may outweigh the benefits that suspect status would provide.

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[26] This Comment does not suggest that either the author or gay rights advocates as a whole believe a school limited to gay youth is a good program or a solution to harassment of gay youth. The constitutionality of a school like the Milk School is used as a case example throughout this Comment to illustrate that even a drastic measure such as a segregated school will likely survive rational basis scrutiny.

[27] 478 U.S. 186 (1986).

[28] 348 U.S. 483, 488 (1955).

[29] 517 U.S. 620 (1996).

[30] 539 U.S. 558 (2003).

Part I considers the historical purposes and traditional meanings of the tiers of scrutiny and the application of rational basis scrutiny to sexual orientation-related legislation under *Romer* and *Lawrence*. Decades before these decisions, the Court began to apply a less deferential form of rational basis review, at least in the context of laws that classified according to identity groups. Cutting back on what qualified as a legitimate interest, the Court suggested that the prejudicial desire to harm an unpopular group is an insufficient basis for withstanding rational basis review.[31] *Romer* and *Lawrence* both applied and further adapted this less deferential rational basis review to laws burdening gay people.[32] Although these decisions did not recognize gay people as a suspect class, the opinions suggest that private prejudice and moral disapproval of gay people are insufficient grounds for upholding laws burdening the group.

If *Lawrence*'s rational basis analysis, read in conjunction with *Romer*, is interpreted to apply to all laws classifying on the basis of sexual orientation, such measures should subsequently fail as they are almost always based on moral disapproval. Thus, strict scrutiny becomes less necessary as a barrier to the harm of discriminatory legislation. Part II explores this idea and recognizes that although the decisions left questions unanswered about how broadly or narrowly the opinions should be read—allowing lower and state courts to construe the holdings differently—the holdings unquestionably make it more difficult for anti-gay measures to survive rational basis review today.

Part III argues that because gay people are still subject to rational basis review (even if the Court appears to be applying a somewhat heightened form), benign legislation meant to remedy anti-gay discrimination will almost certainly withstand constitutional scrutiny with little intervention by the Court. The Milk School—or even a school that explicitly excludes non-gay students—would survive the Court's current judicial scrutiny of gay-related programs.

However, because the Court applies heightened scrutiny not only to discriminatory measures with malicious intent, but also to programs meant to remedy discrimination faced by suspect classes, Part IV suggests that remedial programs like the Milk School would not likely withstand constitutional muster under a heightened level of judicial review.

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[31] *See, e.g.*, U.S. Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("[A] bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

[32] *See infra* Part I.B (discussing how the Court applied rational basis review to statutes classifying on the basis of sexual orientation or behavior).

Although an argument may still be made in favor of suspect status for gay people, the competing arguments against such status reflect the very turning point in the gay rights movement that makes suspect status less desirable. Because so many benign measures to protect gay people from discrimination or remedy past discrimination are being passed today, even though suspect status would still be optimal in some instances of malicious discrimination, Part V suggests that the goal of maintaining gay rights advances may outweigh the risk that anti-gay measures will be affirmed under rational basis review.

Nearly all benign legislation should survive post-*Lawrence* rational basis review while most anti-gay measures should fail. Thus, limited intervention into state and local sexual orientation-related legislation appears more desirable than strict scrutiny of state-sponsored programs.

I. THE APPLICATION OF RATIONAL BASIS REVIEW TO SEXUAL ORIENTATION-BASED LAWS

Despite the fact that rational basis review of legislation is notoriously lenient and pretextual rationales are routinely accepted in the economic context, the Court's application of rational basis scrutiny to statutes classifying on the basis of identity groups has proven less deferential. Decades before the decisions in *Romer v. Evans*[33] and *Lawrence v. Texas*,[34] the Court found that the prejudicial desire to harm a politically unpopular group was not a sufficient basis to withstand rational basis review.[35]

More recently, in *Romer* and *Lawrence*, the Court applied this less deferential approach and further cut back on what qualifies as a legitimate state interest in the context of statutes classifying on the basis of sexual orientation and sexual conduct. The Court's holdings in *Romer* and *Lawrence* suggest that anti-gay sentiment and moral disapproval of gay people provide an insufficient justification for finding legislation constitutional under rational basis review.[36]

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[33] 517 U.S. 620 (1996).

[34] 539 U.S. 558 (2003).

[35] *See infra* text accompanying notes 48–51 (explaining court holdings finding the bare desire to harm to be an insufficient state interest).

[36] While the Court's decisions in *Romer* and *Lawrence* have led many to argue that the Court is applying a heightened form of rational basis review to statutes classifying on the basis of sexual orientation, the Court has not recognized a fundamental right to same-sex conduct, nor has it recognized gay people as a suspect class. *See infra* Part I.B (explaining the holdings and arguments that the scrutiny being applied is something more than rational basis review).

A. *The Evolution of Rational Basis Review Before* Romer *and* Lawrence

1. Williamson v. Lee Optical of Oklahoma, Inc.

Distancing itself from the *Lochner*-era Court which routinely used the Fourteenth Amendment to overturn state legislation,[37] the Court in *Williamson v. Lee Optical of Oklahoma, Inc.* announced that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[38] Under rational basis review, laws would be "presumed to be valid and [would] be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[39]

In *Lee Optical*, the Court laid out its notoriously lenient and highly deferential rational basis standard.[40] It explained that the use of legislative classifications and corresponding reforms "need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[41]

The Court in *Lee Optical* considered the constitutionality of a state law that prohibited opticians from fitting lenses without an ophthalmologist's or optometrist's prescription, among other restrictions.[42] Finding that such a regulation did not violate either the Due Process or Equal Protection Clauses, the Court said that even where the Court itself may believe such regulations to be unnecessary, it was not the Court's role, but the legislature's, to weigh the "advantages and disadvantages" of such regulations.[43] Because eye glass frames are used to treat a health issue relating to the eye and a state may wish to strictly professionalize eye-care treatment, the Court found that it could not "say that the regulation ha[d] no rational relation to that objective and therefore is beyond constitutional bounds."[44] The Court further explained that because "[e]vils in the same field may

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[37] During the so-called *Lochner* era in the Court's jurisprudence, from 1905 until the mid-twentieth century, the Court overruled hundreds of state statutes by applying the Fourteenth Amendment's Due Process Clause. *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 493 (1997) (describing the *Lochner*-era jurisprudence and the Court's application of substantive due process).

[38] Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955).

[39] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

[40] *Lee Optical*, 348 U.S. at 487–88.

[41] *Id.*

[42] *Id.* at 489–91.

[43] *Id.* at 487.

[44] *Id.* at 491.

be of different dimensions and proportions, requiring [or believed by the legislature to require] different remedies,"[45] a state legislature could remedy these evils "one step at a time" or regulate one area of a profession while "neglecting the others."[46]

2. *The "Bare . . . Desire to Harm"*[47]

While the standard adopted in *Lee Optical* suggested that even pretextual rationales would be routinely accepted in economic rational basis cases, in cases where the regulations at issue discriminate on the basis of an identity group, the Court has sometimes applied a more searching and less deferential standard than that set out in *Lee Optical.* In the context of identity groups, the Court has explained that rational basis scrutiny does not leave a group "entirely unprotected from invidious discrimination" where laws are put in place solely to harm or single out an unpopular or stigmatized group.[48]

In *United States Department of Agriculture v. Moreno,*[49] the Court explained that an objective to harm a politically unpopular group is not a legitimate interest for purposes of rational basis review.[50] In *Moreno,* the Court held that legislation preventing households with unrelated members from receiving food stamps did not pass constitutional muster because the purpose of the law was to prevent "hippies" from receiving these benefits.[51]

More recently, in *City of Cleburne, Texas v. Cleburne Living Center,*[52] the Court held that there was no rational basis for the government's requirement that a home for the mentally handicapped have a special use permit since other group homes had no such requirement.[53] The Court explained that the rational basis standard allows local governments the necessary freedom "to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner."[54] However, the city could not "rely on a

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[45] *Id.* at 489.

[46] *Id.*

[47] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 447 (1985).

[48] *Id.* at 446.

[49] 413 U.S. 528 (1973).

[50] *See id.* at 534 ("[A] bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."); *see also* Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (holding that a Massachusetts law providing dissimilar treatment of married and unmarried persons with regards to the right to access contraception violated the Equal Protection Clause).

[51] *Moreno,* 413 U.S. at 534.

[52] 473 U.S. 432 (1985).

[53] *Id.* at 447–48.

[54] *Id.* at 446.

classification whose relationship to an asserted goal [was] so attenuated as to render the distinction arbitrary or irrational."[55]

The Court rejected the City Council's arguments that the special permit was legitimate because of concerns that local property owners had "negative attitudes" and fears about the presence of this type of home in their neighborhood and near a school.[56] It explained that the arguments rested "on an irrational prejudice against the mentally retarded;"[57] the permit requirement was unconstitutional because "the law cannot, directly or indirectly," give effect to private prejudices.[58]

The City Council also claimed that the special permit was necessary to protect the residents in the home since it was situated in a flood plain and its mentally retarded residents might not know how to survive a flood.[59] Further, the City Council claimed that the large size of the home justified the special permit requirement.[60] The Court responded that since patients in a nursing home would face the same dangers in the event of a flood and because the size of the home was no different than the size of fraternity houses and other group houses in the neighborhood, restrictions requiring a special permit only for this particular home were not rationally related to the alleged purpose.[61] The law was motivated by the "bare . . . desire to harm a politically unpopular group"[62] and therefore violated the Equal Protection Clause.[63]

The Court's decisions in *Moreno* and *Cleburne* suggest that in cases in which the state classifies on the basis of identity groups, courts will examine the interests claimed by the state more closely and with less deference than they would in economic rational basis cases.[64] Furthermore, these holdings suggest that pretextual reasons are an insufficient basis upon which to assert a measure's constitutionality where the underlying motive of the classification is prejudice or a desire to harm the group.

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[55] *Id.*

[56] *Id.* at 448.

[57] *Id.* at 450.

[58] *Id.* at 448 (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)) (internal quotations omitted).

[59] *Id.* at 449.

[60] *Id.*

[61] *Id.* at 450.

[62] *Id.* at 447 (quoting U.S. Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (internal quotations omitted).

[63] *Id.* at 435.

[64] Justice Marshall noted that while the majority in *Cleburne* claimed to apply rational basis review to find the ordinance invalid, the "ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation." *Id.* at 456 (Marshall, J., concurring in the judgment and dissenting in part).

B. *Rational Basis Under* Romer *and* Lawrence

The Court's recent decisions in *Romer* and *Lawrence* further narrow the definition of a legitimate interest for a measure classifying on the basis of sexual orientation or conduct, without holding that gay people constitute a suspect class or that same-sex sexual conduct is a fundamental right. Striking down Colorado's Constitutional Amendment 2, which prohibited the passage or enforcement of laws entitling gay people to protected or minority status or preferential treatment, the Court in *Romer* applied a form of rational basis scrutiny similar to that applied in non-commercial equal protection cases like *Moreno* and *Cleburne*. The bare desire to harm a single group—in this case, gay people—is not a legitimate interest to uphold a regulation discriminating against a class. More recently, both the majority opinion and Justice O'Connor's concurrence in *Lawrence* held that moral disapproval alone is not a legitimate state interest for the purpose of upholding laws burdening gay people or same-sex sexual conduct.[65]

1. Romer v. Evans

In *Romer*, the Court held that Colorado's Amendment 2, which prohibited any state or local government bodies or agencies from making or enforcing laws or policies entitling gay people to claim "minority status, quota preferences, [or] protected status or [to assert] claim[s] of discrimination,"[66] violates the Fourteenth Amendment's Equal Protection Clause.[67] Passage of the Amendment by voters meant that laws previously enacted in cities like Denver and Boulder, which prohibited discrimination in areas such as housing and employment on the basis of sexual orientation, were void and unconstitutional.[68] The major problem with Amendment 2, according to the *Romer* majority, was that by state decree, homosexuals "are

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[65] *See infra* Part I.B.2 (discussing the rejection of moral disapproval as a legitimate state interest in the *Lawrence* opinion and Justice O'Connor's concurrence).

[66] COLO. CONST. art. II, § 30b, *reprinted in* COLO. REV. STAT. § 30(b) (2004). The Amendment read:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Id.

[67] Romer v. Evans, 517 U.S. 620, 635–36 (1996).

[68] *See id.* at 623–24. As Justice Kennedy stated, Amendment 2 not only repealed such laws, but also "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect" homosexuals, bisexuals, and lesbians. *Id.* at 624.

put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."[69]

Recognizing the potential for injury to be inflicted upon gay people as a group, Justice Kennedy wrote that discrimination based on an irrelevant characteristic places "a special disability" on gay people alone.[70] "Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it."[71] The amendment prevented gay people from accessing protections which are part of ordinary civic life and are often taken for granted by those who are already protected or who do not need them.[72]

Echoing earlier court analysis of rational basis review in the context of politically unpopular groups, Justice Kennedy explained that "[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[73] Justice Kennedy reasoned:

> [L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[74]

The Court concluded that Amendment 2 was inspired by animus and that any animus-based justification for a law fails rational basis review.[75]

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[69] *Id.* at 627.

[70] *Id.* at 631.

[71] *Id.* at 635.

[72] *Id.* at 631. As Professor William N. Eskridge, Jr. argues, the *Romer* opinion marked the Court's rejection of the notion that anti-discrimination laws based upon sexual orientation conferred "special rights." William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1038 (2004). Instead, the Court articulated the protections at issue as "'normal' protections everyone else either takes for granted or enjoys." *Id.*

[73] *Romer*, 517 U.S. at 633.

[74] *Id.* at 634 (quoting U.S. Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[75] *Id.* Justice Scalia's dissent in *Romer* is largely irrelevant today because he relied on *Bowers v. Hardwick*, 478 U.S. 186 (1986), in arguing that if homosexual conduct can be permissibly criminalized, then a state may enact laws disfavoring the people who engage in this conduct.

2. Lawrence v. Texas

a. *Majority Opinion*

Rejecting the Court's holding in *Bowers v. Hardwick*,[76] in which the majority held that homosexuals could be denied the right to engage in forms of sexual conduct, *Lawrence* went further than *Romer* by suggesting that moral disapproval is insufficient grounds to withstand rational basis scrutiny, at least in the context of sexual conduct. The Court held that criminalizing intimate sexual behavior is a violation of gay people's due process right to liberty.[77] Quoting Justice Stevens' dissent in *Bowers*, in which he argued that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,"[78] the Court held that Stevens' analysis "should have been controlling in *Bowers* and should control here."[79]

Romer, 517 U.S. at 641 (Scalia, J., dissenting). *Bowers* was explicitly overruled by the Court in *Lawrence v. Texas*, 539 U.S. 558, 560 (2003).

[76] 478 U.S. 186 (1986). In overruling *Bowers*, Justice Kennedy wrote that the majority "misapprehended the claim of liberty" presented by the case, characterizing the question simply as "whether there is a fundamental right to engage in consensual sodomy" rather than whether the state may regulate "the most private human conduct." *Lawrence*, 539 U.S. at 567.

[77] *Lawrence*, 539 U.S. at 578. Justice Kennedy wrote that the case "involve[d] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives." *Id.* The holding relied heavily on the due process personal liberty and privacy interests explicated by the Court in cases such as *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992), in which the Court reaffirmed due process rights to make personal decisions regarding issues such as marriage, use of contraception, family relationships, and education. The Court also relied heavily on the holdings of *Eisenstadt v. Baird*, 405 U.S. 438 (1972), which held that a law banning distribution of contraceptives to unmarried people was invalid under the Equal Protection Clause, and *Griswold v. Connecticut*, 381 U.S. 479 (1965), which defined a right to privacy within the marital sphere.

[78] *Lawrence*, 539 U.S. at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)) (internal quotations omitted).

[79] *Id.* at 578. Although the Court never explicitly stated that it was applying rational basis review, the Court also did not announce same-sex sodomy as a fundamental right. *See id.* ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."). *Lawrence*'s rejection of moral disapproval as a legitimate interest, however, has led many to argue that the Court applied a heightened degree of scrutiny without saying so. Justice Scalia argued that "enforcement of traditional notions of sexual morality" has always been a sufficient basis for surviving rational basis scrutiny and that the Court's holding to the contrary signaled the Court's application of something more than rational basis review. *Id.* at 601 (Scalia, J., dissenting). Professor Laurence H. Tribe noted that the *Lawrence* majority's reliance on cases which affirmed fundamental liberty interests, such as the right to use contraception or make decisions regarding child-bearing, was evidence of its application of a heightened form of scrutiny. Laurence H. Tribe, Essay, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1917 (2004). After *Lawrence*, Martin A. Schwartz argued that the "state interest in promoting morality is not a legitimate governmental interest and that the state does not have a legitimate governmental in-

Although the *Lawrence* decision can be interpreted as applying simply to criminal sexual conduct, Justice Kennedy suggested that the conduct at issue was inextricably linked to the identity of gay people. Justice Kennedy wrote that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."[80] The holding can therefore be read as extending the reach of "moral disapproval" as an illegitimate reason to all classifications made on the basis of sexual orientation or identity. Justice Kennedy wrote:

> To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. *Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.* The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.[81]

The case served as an opportunity to say that the liberty interest at stake—the right of consenting adults to engage in sodomy within the confines of their homes—went beyond the issue of privacy, and had implications for gay people in the public realm, as well.[82] The decision, Professor Tribe argued, went "out of its way to equate the insult of reducing a same-sex intimate relationship to the sex acts committed within that relationship with the insult of reducing a marriage to heterosexual intercourse."[83]

By equating sexual conduct with sexual identity, Justice Kennedy appears to suggest that "moral disapproval" would not constitute a legitimate purpose under an equal protection challenge despite the fact that the holding was decided on due process grounds. He wrote that if "protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection

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terest in harming a politically unpopular group." Martin A. Schwartz, Lawrence v. Texas: *The Decision and Its Implications for the Future*, 20 TOURO L. REV. 221, 230 (2004).

[80] *Lawrence*, 539 U.S. at 567.

[81] *Id.* (emphasis added).

[82] Justice Kennedy stated that "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Id.* at 575.

[83] Tribe, *supra* note 79, at 1948.

reasons."[84] Although he believed that Lawrence had made a "tenable" equal protection argument, Justice Kennedy wrote that to hold the Texas statute invalid on Equal Protection grounds could raise the possibility that a similar statute, drawn so as to prohibit certain conduct regardless of sex, would be valid.[85]

b. *Justice O'Connor's Concurrence*

Justice O'Connor, concurring in the judgment, found the Texas sodomy statute unconstitutional on equal protection grounds. Justice O'Connor reasoned that the statute made gay people "unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction."[86] Like the majority, she found that moral disapproval is not a legitimate reason to withstand rational basis. She also equated sexual conduct with sexual identity, suggesting that moral disapproval is not a legitimate state interest for purposes of classifying on the basis of sexual orientation or conduct.

Citing *Romer*, Justice O'Connor found moral disapproval to fall within the meaning of the *Romer* court's rejection of the desire to harm an unpopular group as sufficient to survive rational basis analysis under the Equal Protection Clause. She argued that there was no rational basis to deny one group, gay people, the right to engage in same-sex sexual relations.[87] Justice O'Connor asserted that moral disapproval of a group, "like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."[88] Citing *Romer*, Justice O'Connor stated that equal protection disallows states from creating classifications for its own sake or for the sake of disadvantaging the burdened group.[89] Therefore, "a more searching form of rational basis review" is warranted in these cases.[90]

Just as the majority recognized that the constitutionality of the statute went beyond a question of homosexual conduct, Justice O'Connor rejected the notion that the law was about conduct and found that the Texas sodomy law was "directed towards gay persons as a class."[91] Because same-sex sodomy was criminal under Texas law, homosexuals were branded as criminals, which resulted in discrimination against the class of homosexuals in areas outside criminal

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[84] *Lawrence*, 539 U.S. at 575.
[85] *Id.* at 574–75.
[86] *Id.* at 581 (O'Connor, J., concurring).
[87] *Id.* at 582 (citing Romer v. Evans, 517 U.S. 620, 634–35 (1996)).
[88] *Id.*
[89] *Id.* at 583 (citing *Romer*, 517 U.S. at 635).
[90] *Id.* at 580.
[91] *Id.* at 583.

law.[92] Such criminalization, Justice O'Connor argued, stigmatized homosexuals and was therefore unconstitutional.[93]

After *Romer* and *Lawrence*, it appears that moral disapproval alone is an insufficient basis for upholding state programs that classify on the basis of sexual orientation or sexual conduct.

II. MOST DISCRIMINATORY LEGISLATION SHOULD NOT SURVIVE UNDER ROMER AND LAWRENCE'S READING OF RATIONAL BASIS REVIEW

Because the Court has significantly restricted the definition of a legitimate interest since *Lee Optical*, today, in the aftermath of *Romer* and *Lawrence*, laws discriminating against gay people should rarely survive rational basis review. Sexual orientation is seldom relevant to one's ability to contribute to society, so the state will almost never have anything other than moral disapproval or prejudice to hang its hat on in arguing for a law burdening gay people. However, not all anti-gay legislation will fail judicial scrutiny after *Lawrence*. Both the majority opinion and Justice O'Connor's concurrence in *Lawrence* emphasized that the Court's decision did not extend to same-sex marriage.[94] Moreover, because the Court did not recognize same-sex conduct as a fundamental right or find gay people to be a suspect class, some courts have applied the decision very narrowly.[95] Undoubtedly, though, the Court's rulings in *Romer* and *Lawrence have* made it more difficult for anti-gay legislation to withstand rational basis review. They have allowed courts to strike down anti-gay legislation and affirm gay civil rights under rational basis in ways that courts previously would not have been able to do.[96]

A. Moral Disapproval and Discriminatory Legislation

Although the holding in *Lawrence* specifically considered the constitutionality of "criminal" gay sexual *conduct*, the decision went further by suggesting that when a state criminalizes the activities of "homosexual persons" as undesirable or immoral, it invites unlawful discrimination and stigmatization of *gay people* "in the public and in

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[92] *Id.* at 583–84. Justice O'Connor appears to suggest that the criminalization of gays sanctions other forms of discrimination and stigmatizes them as people who, as a result of their sexual identity, are, in a sense, illegal beings. *Id.*

[93] *Id.*

[94] *See infra* Part II.B.1 (describing the disclaimers made by Justices Kennedy and O'Connor with respect to gay marriage).

[95] *See infra* Part II.B.2 (discussing several lower and state court decisions reading the *Lawrence* holding narrowly).

[96] *See infra* Part II.A (discussing several lower and state court decisions reading the *Lawrence* decision broadly).

the private spheres."[97] Because "the law cannot, directly or indirectly," give effect to private prejudices,[98] the opinion can be interpreted as saying that—despite deciding the case on due process grounds in the context of sexual *conduct*—laws meant to stigmatize *gay people as a group* that are motivated by "moral disapproval" should also be found unconstitutional on equal protection grounds.[99] Similarly, Justice O'Connor echoed Justice Kennedy's sentiment in finding Texas's anti-sodomy law unconstitutional on equal protection grounds in her concurring opinion. She wrote that "[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.[100]

In his harsh dissent, Justice Scalia correctly predicted that, after *Lawrence*, it would be difficult for any law burdening gay people to survive judicial scrutiny. He wrote, with reference to Justice O'Connor's concurrence:

> If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, and if, as the Court coos . . . "when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring," what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "the liberty protected by the Constitution"? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.[101]

Scalia also criticized the equal protection argument made by Justice O'Connor in her concurrence—that *Lawrence* does not prevent a

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[97] *Lawrence*, 539 U.S. at 575. In full, Justice Kennedy wrote:

> When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

Id.

[98] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 448 (1984) (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

[99] *Romer* is also instructive in explaining why measures discriminating against gay people should fail under rational basis review after *Lawrence*. By singling out gay people for discrimination, Colorado's Amendment 2 inflicted on gay people "immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it." Romer v. Evans, 517 U.S. 620, 635 (1996). Because sexual conduct is the primary basis used to distinguish homosexuals from heterosexuals and because regulations of this conduct are irrationally based on moral disapproval, it is difficult to see how regulations discriminating against gay people could be rationalized.

[100] *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring). The sodomy law, she argued, was not simply targeted at sexual conduct, but "toward gay persons as a class. 'After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.'" *Id.* at 583 (quoting *Romer*, 517 U.S. at 641 (Scalia, J., dissenting)).

[101] *Lawrence*, 539 U.S. at 604–05 (Scalia, J., dissenting) (internal citations omitted).

state from restricting same-sex marriage if its purpose is to preserve marriage as an institution. Justice Scalia responded that "preserving the traditional institution of marriage" can be interpreted as serving to preserve "the traditional sexual mores of our society,"[102] therefore making it an invalid state expression of "moral disapproval."[103] Thus, Justice Scalia argued that both Justice Kennedy and Justice O'Connor had opened the door to courts' finding that gay people could not be denied most, if any, rights.

The holding in *Goodridge v. Department of Public Health*[104] reveals the impact that *Romer* and *Lawrence*'s application of judicial scrutiny may have on future challenges to the constitutionality of laws discriminating against gay people. The Massachusetts court, in legalizing same-sex marriage, cited Justice Kennedy's opinion in *Lawrence*, saying that "whom to marry, how to express sexual intimacy, and whether and how to establish a family . . . are among the most basic of every individual's liberty and due process rights."[105] Concurring in the decision, Judge Greaney read *Lawrence* as Justice Scalia's dissent had predicted—that traditions and moral convictions do not provide a sufficient rational basis upon which to deem same-sex couples and their families less worthy of similar legal recognition.[106]

However, more than *Lawrence*, the court's analysis echoed Justice Kennedy's *Romer* opinion in rejecting each of the three rationales asserted by the State of Massachusetts for prohibiting same-sex marriage. These included the interest in "providing a 'favorable setting for procreation,'" an "optimal setting for child rearing" of one mother and one father in the same household, and the need to "preserv[e] scarce State and private financial resources."[107]

Rejecting the procreation argument, the court noted that Massachusetts used the "one unbridgeable difference" between gay and non-gay couples, the ability to procreate, and then defined procreation as the "essence" of marriage.[108] Citing *Romer*, the court explained that Massachusetts impermissibly used a single trait, the ability to procreate, to prohibit one group—gay people—from the right to marry, even though procreation is not a requirement of non-gay couples who marry.[109] The same argument pertained to the "child rearing"[110] rationale because there was no evidence that banning same-sex

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[102] *Id.* at 601.
[103] *Id.* at 602.
[104] 798 N.E.2d 941 (Mass. 2003).
[105] *Id.* at 959.
[106] *Id.* at 973 (Greaney, J., concurring).
[107] *Id.* at 961 (majority opinion).
[108] *Id.* at 962.
[109] *Id.* (citing Romer v. Evans, 517 U.S. 620, 633 (1996)).
[110] *Id.* at 961.

marriage would further the State's interest in encouraging more two-parent heterosexual families or that same-sex couples could not be excellent families.[111]

Lastly, the court found no rational relationship between the marriage ban and the State's preservation of economic resources. The State argued that same-sex couples were more financially sound than non-gay couples, and therefore did not need the financial benefits afforded opposite sex couples.[112] The court noted that there was no evidence that same-sex couples were more financially sound than opposite sex couples and it further noted that heterosexual couples, regardless of their financial status, could receive the same benefits that the State wished to deny gay couples.[113]

Mirroring the sentiments of *Romer*, the court stated:

> The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against [gay people].[114]

The court further noted that although private prejudice is outside the law's reach, it cannot give such biases effect.[115] Therefore, Massachusetts had expressed no rational basis for its marriage restriction.

More recently, in *Kansas v. Limon*, the Kansas Supreme Court applied both *Romer* and *Lawrence* in holding that a "Romeo and Juliet statute," which applied only to opposite sex pairs, violated the Equal Protection Clause.[116] The appellant argued that the statute was unconstitutional because an offender whose underage partner was of the opposite sex received more lenient sentences as a result of the statute's protections, whereas an offender whose partner was of the same sex was not covered under the law and thus faced harsher sentences for violations.[117] Even though the *Lawrence* majority limited its analysis to the due process claim, the court reasoned that the decision recognized that the due process and equal protection analyses "are inevitably linked" and require weighing nearly the same fac-

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[111] *Id.* at 962–64.

[112] *Id.* at 964.

[113] *Id.*

[114] *Id.* at 968.

[115] *Id.* (citing Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

[116] Kansas v. Limon, 122 P.3d 22, 24 (Kan. 2005). The statute, KAN. STAT. ANN. § 21-3522 (2004), created shorter prison terms where voluntary sexual acts occurred between a minor and an adult, where the adult was less than nineteen years old and no more than four years older than the minor, and the minor was fourteen or fifteen years of age.

[117] *Limon*, 122 P.3d at 24.

tors.[118] Finding that *Lawrence* applied in the equal protection context, the court in *Limon* explained that "moral disapproval *of a group* cannot be a legitimate governmental interest."[119] And although morality-based laws are not "objectionable if the laws are applied fairly to all" under equal protection, they are illegitimate when the "classifications are drawn for the purpose of invoking moral disapproval with 'the purpose of disadvantaging the group burdened by the law.'"[120]

The *Goodridge* and *Limon* decisions suggest that lower and state courts can more easily strike down laws discriminating against gay people in the wake of *Romer* and *Lawrence* than they could prior to these decisions.

B. The Limitations of Lawrence

1. *The Exception of Same-Sex Marriage?*

Although *Lawrence* may have given lower and state courts greater ease in striking down discriminatory laws and allowed the court in *Goodridge* to strike down restrictions on gay marriage, both Justice Kennedy and Justice O'Connor said that *Lawrence* should not be read as suggesting that there is not a rational basis for reserving marriage to heterosexual couples. Justice Kennedy went out of his way to say that the Texas sodomy law did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," but instead involved the right of two mutually consenting adults to engage in private sexual conduct.[121] And Justice O'Connor observed that "Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage. . . . [O]ther reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."[122]

Justice Scalia, writing in dissent, said that these disclaimers make no sense in the context of the opinions as a whole. He wrote that, just as the people may believe that their "disapprobation" of same-sex conduct is great enough to support a ban on gay marriage but not sufficient to criminalize the conduct itself, "[t]he Court . . . pretend[ed] that it possesse[d] a similar freedom of

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[118] *Id.* at 34 (quoting Lawrence v. Texas, 539 U.S. 558, 575 (2003) in stating that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests").

[119] *Id.* (emphasis added).

[120] *Id.* (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).

[121] *Lawrence*, 539 U.S. at 578.

[122] *Id.* at 585 (O'Connor, J., concurring).

action . . . ."[123] Justice Scalia argued that by suggesting that people in same-sex relationships may seek autonomy for purposes such as "personal decisions relating to marriage,"[124] Justice Kennedy's disclaimer concerning gay marriage was inconsistent with the remainder of his opinion.[125] Similarly, he argued that Justice O'Connor's stated legitimate interest for banning gay marriage—"preserving the traditional institution of marriage"—was simply "a kinder way of describing the [very] moral disapproval" that her opinion suggested is not a legitimate interest.[126]

Justice Scalia correctly points out that both Justice Kennedy's and Justice O'Connor's disclaimers regarding gay marriage do not fit squarely with the "moral disapproval" reasoning on which their opinions are based. It may be that the Justices were simply trying to minimize public reaction to the decision. But, whatever the case, the unexplained disconnect between the marriage disclaimer and the remainder of the opinions suggests that the marriage exclusion will not survive judicial scrutiny in the long term.

2. *Lower Courts May Read* Lawrence *More Narrowly*

The fact that the Court did not recognize a fundamental right to same-sex sodomy in *Lawrence* has allowed several lower and state courts to apply the traditional doctrinal rules of rational basis review to measures classifying on the basis of sexual orientation.[127] The dissenting judges in *Goodridge* interpreted the *Lawrence* decision more narrowly than the majority and argued that *Lawrence* merely decriminalized private behavior that violated one's liberty interest.[128] In his dissent, Judge Spina asserted that the *Lawrence* opinion did not demand formal public recognition of certain relationships by the government but simply greater due process protections when individual privacy rights are denied as a result of unnecessary government restrictions.[129]

Recently, in *Lofton v. Secretary of the Department of Children & Family Services*,[130] the Eleventh Circuit upheld a Florida statute prohibiting

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[123] *Id.* at 604 (Scalia, J., dissenting).

[124] *Id.* (citing *id.* at 574 (majority opinion)) (emphasis omitted).

[125] *Id.* (Scalia, J., dissenting).

[126] *Id.* at 601 (quoting *id.* at 585 (O'Connor, J., concurring)) (emphasis omitted).

[127] Some scholars have also read *Lawrence* as simply decriminalizing private behavior that violated individual due process liberty interests. As suggested by Professor Schwartz, the *Lawrence* holding is limited to "homosexual sodomy as a liberty interest and nothing more." Schwartz, *supra* note 79, at 227.

[128] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 986 (Mass. 2003) (Cordy, J., dissenting).

[129] *Id.* at 978 (Spina, J., dissenting).

[130] 358 F.3d 804 (11th Cir. 2004).

adoption by gay individuals. The court reasoned that *Lawrence* had applied rational basis review in order "to establish a greater respect" solely for the right of adults to engage in consensual sexual relations.[131] It noted, however, that there was no fundamental-rights inquiry or recognition in the *Lawrence* decision.[132] The court further narrowed the *Lawrence* holding by citing Justice Kennedy's explicit explanation of what the case in *Lawrence* involved: "[t]he present case [did] not involve minors."[133] This allowed the court in *Lofton* to hold that because the present case involved minors, *Lawrence* did not apply.[134]

Having concluded that there was no fundamental right at issue, the court in *Lofton* referred to *Romer* in determining that gay people are not a recognized suspect class and are therefore subject to rational basis review.[135] The court concluded that the State's asserted interest in promoting adoption by married couples was a legitimate interest and was unrelated to public morality.[136] The court also took the opportunity to state that even if Florida had claimed an interest in "protecting order and morality,"[137] it would have been a "substantial" interest and not simply a legitimate one.[138]

The disparate holdings of lower and state courts that have resulted from differing interpretations of *Lawrence* reflect the confusion that has stemmed from the Court's concurrent unwillingness to recognize a fundamental right to same-sex sodomy and considerable reduction of what satisfies a legitimate state interest for the purposes of rational basis review. And while this means that anti-gay measures can still be struck down more easily than they would under strict scrutiny, the Court's rulings in *Romer* and *Lawrence* have unquestionably

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[131] *Id.* at 815–16. Several courts have interpreted the *Lawrence* analysis similarly narrowly. *See, e.g.*, Anderson v. Morrow, 371 F.3d 1027, 1032–33 (9th Cir. 2004) (finding that *Lawrence* stood for the proposition that the Due Process Clause "protects the right of two individuals to engage in fully and mutually consensual private sexual conduct"); Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1236–38 (11th Cir. 2004) (finding that *Lawrence* applied rational basis without invoking strict scrutiny); *In re* Kandu, 315 B.R. 123, 139–40 (Bankr. W.D. Wash. 2004) (finding that the *Lawrence* majority applied rational basis review to determine the constitutionality of the Texas law and thus concluding that a fundamental right of gay couples to marry is not implied in the decision).

[132] *Lofton*, 358 F.3d at 817.

[133] *Id.* (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

[134] *Id.*

[135] *Id.* at 817–18 (citing Romer v. Evans, 517 U.S. 620, 631 (1996)).

[136] *Id.* at 819.

[137] *Id.* at 819 n.17 (quoting Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991)).

[138] *Id.* (quoting *Barnes*, 501 U.S. at 569). The court did not reference *Lawrence* during this discussion, most likely because of its narrow reading of the *Lawrence* decision and its desire not to imbue it with broad authority and also because the court was considering the appellants' equal protection challenge, not its due process claim.

made it more difficult for anti-gay legislation to withstand rational basis review than it had been prior to these decisions.

III. THE CONSTITUTIONALITY OF AN EXCLUSIVELY GAY SCHOOL UNDER RATIONAL BASIS REVIEW

A constitutional challenge to a state-sponsored school enrolling only gay students raises the reverse argument of *Romer*. If the state cannot single out gay people in order to deny them legal protections simply because they are an unpopular group, can the state single out gay people in order to protect them from private prejudice such as harassment? Under rational basis review of laws applying identity classifications, a state cannot burden a disadvantaged group out of a bare desire to harm or stigmatize them, but it may single out a disadvantaged group for the purpose of benefiting or protecting the group from discrimination as long as there is a legitimate interest.

In his majority opinion in *Romer*, Justice Kennedy explained,

> [T]he amendment imposes a special disability upon [homosexuals] alone. . . . We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.[139]

Rational basis review actually encourages benign legislation. As the Court in *Cleburne* explained, legislation

> singling out [a group] for special treatment [often] reflects . . . real and undeniable differences between [them] and others. That a civilized and decent society expects and approves such legislation indicates that governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable.[140]

The Court argued that because many groups have special abilities and needs, "governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts."[141]

If a legitimate state interest is asserted for singling out gay people and its purpose is rationally related to that interest and not meant to harm the group, such a program or legislation will withstand rational basis review. Moreover, even if the court believes there is a problem to remedy, there is a less burdensome remedy, or the remedy does not adequately address the scope of the problem, the court will still not interfere so long as the state purports to have a legitimate reason

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[139] *Romer*, 517 U.S. at 631.

[140] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 444 (1985).

[141] *Id.* at 445.

to believe it may be warranted.[142] An argument by a state that a gay school—exclusive or not—is rationally related to the state's interest in remedying anti-gay harassment should be sufficient to satisfy rational basis review.

A. Rational Basis Review Applies to Claims Involving Real or Perceived Sexual Conduct, Sexual Identities, and Transsexuality

Sexual orientation-related laws may deal with those who engage in or are perceived to engage in homosexual conduct, those who identify as or are perceived to be homosexual, and those who identify as or are perceived to be transsexual. This multiplicity is especially clear in the context of a gay school where students are young and may fit within any one or more than one of these categories. Even though the Milk School or schools like it may be a conglomeration of these groups, courts, as evidenced by the Court in *Romer* and *Lawrence*, rarely distinguish between these categories[143] and have consistently considered laws related to real or perceived homosexual conduct and homosexual identity under rational basis review.[144] Statutes related to

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[142] Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–89 (1955).

[143] *Romer* applied rational basis review to an ordinance that discriminated on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." 517 U.S. at 624 (quoting COLO. CONST. art. II, § 30b). In *Lawrence*, Justice Kennedy argued that rights regarding sexual acts are directly related to the human relationships of those who participate in those acts. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[144] Those cases considering the "Don't Ask, Don't Tell" policy of the U.S. military, compelling the discharge of gay service members and those who engage in homosexual conduct but do not necessarily identify as gay, serve as good examples of courts' similar treatment of gay people, those perceived to be gay, and those who engage in same-sex intimate conduct. *See* 10 U.S.C. § 654 (2000) (codifying the "Don't Ask, Don't Tell" policy). Janet Halley observes that

> [d]oing things that make your commander think you are gay—like making pro-gay statements, or cutting your hair a certain way, or not fitting the gender stereotype of the sex you belong to—can be the basis for an inference that you have engaged in or might someday engage in homosexual conduct . . . .

JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 2 (1999). Sexual propensity refers equally to "homosexual status" and "homosexual acts." *Id.* at 16.

The Ninth Circuit's holding in *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997), provides one example of the nondifferentiation that is common among circuit courts that have considered military discharges. Philips involved the discharge of a naval service member who had disclosed his homosexuality. The court, applying rational basis review, found no violation of the Equal Protection Clause. *Id.* at 1429. The majority held "that the relationship between the Navy's mission and its policy on homosexual acts is not so attenuated as to render the distinction arbitrary and irrational." *Id.* According to the court, the exclusion of openly gay service members or those engaging in homosexual conduct, who may threaten the cohesion of units and its overall capability, is rationally related to "maintaining effective armed forces." *Id.* at 1424–26.

Although the service member in Philips had acknowledged that he was homosexual and that he also engaged in homosexual acts, the court discussed the application of rational basis review to the discharge of both self-identified gays and those engaging or unrebuttably presumed to have engaged in homosexual conduct:

transsexual identity are also considered under rational basis review.[145]

B. Courts Consistently Recognize That Schools Have a Duty to Protect Gay Students from Harassment

Courts have long recognized that schools have a constitutional duty to ensure that students have equal access to learning in an educational environment and are therefore obliged to take measures to prevent harassment that could interfere with this access. Appellate courts have repeatedly held that no rational basis exists for failure to protect gay students from harassment by teachers or, as is most often the case, other students.

> Homosexual conduct is grounds for separation from the Military Services . . . . Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts.

Id. at 1424 (quoting DEP'T OF DEF., DEPARTMENT OF DEFENSE DIRECTIVE 1332.14 ¶ E3.A1.1.8.1.1. (1993)). The court affirmed that discharges on any of these grounds are subject only to rational basis review because homosexuals are not members of a suspect or quasi-suspect class. *Id.* at 1425.

[145] Many of the students attending The Milk School are transsexual youth. Transsexuals are not necessarily homosexual: their identities are defined not by whom they share intimate or sexual relations with, but rather by how they perceive their sex or gender. Transsexuals may be defined as "person[s] who psychologically identif[y] with the opposite sex and may seek to live as a member of this sex [especially] by undergoing surgery and hormone therapy to obtain the necessary physical appearance (as by changing the external sex organs)." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1330 (11th ed. 2003). One could argue that discrimination against or segregation of transsexuals falls within the category of sex or gender discrimination, making it subject to intermediate scrutiny, and not within the classification of "sexual orientation." However, as evidenced by cases such as *Farmer v. Brennan*, 511 U.S. 825 (1994), and *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004), courts have subsumed transsexuality or gender identity within the term "sexual orientation" or have simply linked them and thus subjected laws directed at transsexuals to rational basis scrutiny.

In *Farmer*, the Court defined transsexuals as having "'[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,' and . . . typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change." *Farmer*, 511 U.S. at 829 (quoting AM. MED. ASS'N, ENCYCLOPEDIA OF MEDICINE 1006 (1989)). In *Reyes-Reyes*, the Ninth Circuit considered the political asylum claim of a refugee described by the court as "a homosexual male with a female sexual identity. He dresses and looks like a woman, wearing makeup and a woman's hairstyle." *Reyes-Reyes*, 384 F.3d at 785. The court linked the refugee's sexual identity with sexual orientation, finding that "Reyes's sexual orientation, for which he was targeted, and his transsexual behavior are intimately connected." *Id.* at 785 n.1.

Despite the fact that gender identity would arguably constitute sex and therefore make it a quasi-suspect classification subject to intermediate scrutiny, the courts that have considered transsexuality have applied rational basis review.

In *Nabozny v. Podlesny*,[146] the Seventh Circuit held that there was no "'reasonably conceivable state of facts' that would provide a rational basis for the government's conduct. . . . [in] permitting one student to assault another based on the victim's sexual orientation."[147] Jamie Nabozny was the victim of repeated physical abuse and harassment throughout middle school and high school by peers as a result of his homosexuality.[148] Despite the school's policy of punishing battery and sexual harassment by students, some school officials ignored Nabozny's pleas for help, while some officials allegedly took part in the mocking.[149]

Holding that a fact-finder could reasonably find that Nabozny's Fourteenth Amendment equal protection rights were violated based on both his gender and sexual orientation, the Seventh Circuit reversed the district court's grant of summary judgment and remanded the case.[150] The court found that "the Constitution prohibits intentional invidious discrimination between otherwise similarly situated persons based on one's membership in a definable minority, absent at least a rational basis for the discrimination."[151] Because the court concluded that "[t]here can be little doubt that homosexuals are an identifiable minority subjected to discrimination in our society," it held that discrimination based on homosexuality is constitutionally prohibited absent a rational basis.[152]

The Ninth Circuit, in *Flores v. Morgan Hill United School District*,[153] followed *Nabozny* in holding that the failure of a school district to enforce a student's right to be free from intentional discrimination and peer harassment, and to prevent emotional and physical harm to students who were or were perceived to be gay, was sufficient evidence for a jury to find that the school district had violated the student's constitutional equal protection rights.[154] Alana Flores had discovered pornography and notes reading "[d]ie, dyke bitch" in her locker, as well as graffiti on the outside of the locker.[155] When Flores repeatedly confronted the assistant principal about the harassment, her appeals for action were denied and she was told not to bring such "trash" to the principal in the future.[156] Another plaintiff in the suit was hospi-

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[146] 92 F.3d 446 (7th Cir. 1996).
[147] *Id.* at 458 (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313–14 (1993)).
[148] *Id.* at 449.
[149] *Id.*
[150] *Id.* at 449, 460–61.
[151] *Id.* at 457.
[152] *Id.*
[153] 324 F.3d 1130 (9th Cir. 2003).
[154] *Id.* at 1132.
[155] *Id.* at 1133.
[156] *Id.*

talized with bruised ribs after six students saying "[f]aggot, you don't belong here," beat the student.[157] Only one of the six students involved in the beating was disciplined.[158]

Holding that gay people are not recognized as a suspect or quasi-suspect class, the court nonetheless concluded that gay students are a definable group entitled to basic rational basis review.[159] The court held that the Equal Protection Clause "requires the defendants to enforce District policies in cases of peer harassment of homosexual and bisexual students in the same way that they enforce those policies in cases of peer harassment of heterosexual students."[160] The court could not identify any rational basis for allowing students to harass others based on their sexual orientation; it therefore held that, by allowing such harassment, the school violated the students' equal protection rights.[161]

C. *Applying Rational Basis Review in Determining the Constitutionality of Gay Schools*

The Milk School contends that, because gay students are vulnerable to abuse in community schools, a special school is necessary in order to protect them. Beyond the physical threats posed by attendance in mainstream schools, the School argues that the mental and emotional effects of harassment and threat of harm create a need for special support in a separate school.[162] Thus, both a school aimed at gay youth, but open to all, and a school exclusively for gay youth should survive rational basis scrutiny. Such a remedy is rationally related to an interest in preventing anti-gay harassment.

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[157] *Id.*

[158] *Id.* There were five additional plaintiffs, all of whom claimed that they were subjected to repeated taunting, slurs, and obscene gestures and that administrators took no action to stop the harassment. *Id.*

[159] *Id.* at 1137.

[160] *Id.*

[161] *Id.* at 1138. For examples of other cases holding that discriminatory treatment of students harassed because they are gay is prohibited under the Equal Protection Clause, see *Doe v. Perry Community School District*, 316 F. Supp. 2d 809, 829 (S.D. Iowa 2004) (holding that discrimination in the treatment of students who are harassed based on sexual orientation is prohibited by the Equal Protection Clause); *Montgomery v. Independent School District No. 709*, 109 F. Supp. 2d 1081, 1089 (D. Minn. 2000) (holding that discrimination based on sexual orientation is prohibited under the Equal Protection Clause where a school district failed to protect a student perceived as gay from harassment).

[162] *See* Hetrick-Martin Institute, F.A.Q's, *supra* note 3 (describing why the Milk School was created); *see also* Herszenhorn, *supra* note 17, at A12 (discussing the Milk School's justifications for the school).

One survey of gay youth found that more than ninety percent had heard anti-gay slurs from peers in school.[163] Another survey found that more than one-third of students surveyed reported that they had heard homophobic remarks from school faculty and staff.[164] In 2003, two-thirds of gay youth surveyed felt unsafe at school and a majority had experienced some form of harassment.[165] Similarly, a 1999 survey revealed that nearly forty-six percent of those gay youth reporting harassment experienced daily verbal abuse, more than twenty-seven percent experienced physical harassment, and approximately fourteen percent were physically assaulted.[166] One study suggested that gay youth were also four times more likely than non-gay youth to be threatened with a weapon by another student on school property.[167] Gay students experiencing harassment reported that more than thirty-nine percent of the time neither school staff nor other students intervened after hearing homophobic slurs.[168]

A Massachusetts study found that, as a result of harassment in schools, gay students were five times more likely than non-gay students to miss school.[169] It is estimated that nearly twenty-five percent of homeless youth are gay.[170] Forty percent of gay youth attempt suicide,[171] making them three times more likely than non-gay youth to commit suicide.[172] Twenty-eight percent of gay teens drop out of

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[163] JOSEPH G. KOSCIW, THE 2003 NATIONAL SCHOOL CLIMATE SURVEY: THE SCHOOL RELATED EXPERIENCES OF OUR NATION'S LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH 5 (2003), *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/300-3.PDF.

[164] Sexuality Info. and Educ. Council of the U.S. (SIECUS), *Lesbian, Gay, Bisexual and Transgender Youth Issues*, 29 SIECUS REP. 3 (Supp. 2001), *available at* http://www.siecus.org/pubs/fact/FS_lgbt_youth_issues.pdf. In one study, fifty percent of female respondents and thirty-seven percent of male respondents reported that when homosexuality was discussed in class, it was discussed in a negative manner. *See* Hetrick-Martin Institute: Home of the Harvey Milk School, LGBTQ Youth Statistics, http://www.hmi.org/HOME/Article/Params/articles/1320/pathlist/s1036_o1222/default.aspx#item1320 (last visited Jan. 27, 2005).

[165] KOSCIW, *supra* note 163, at 12–14 (revealing the prevalence of anti-gay harassment in schools).

[166] SIECUS, *supra* note 164, at 3.

[167] *Id.*

[168] *Id.*

[169] Kim Paula Kirkley, *Don't Forget the Safety Net That All-Gay Schools Provide in Considering the Issues Raised by All-Female Public Education*, 14 N.Y.L. SCH. J. HUM. RTS. 127, 133 (1997) (citing MASS. DEP'T OF EDUC., MASSACHUSETTS HIGH SCHOOL STUDENTS AND SEXUAL ORIENTATION RESULTS OF THE 1995 YOUTH RISK BEHAVIOR SURVEY (1995)).

[170] *Id.* at 135 (citing U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE (1989)).

[171] Hetrick-Martin Institute: Home of the Harvey Milk School, LGBTQ Youth Statistics, *supra* note 164.

[172] Bethard, *supra* note 6, at 418 (citing NAT'L MENTAL HEALTH ASS'N, BULLYING IN SCHOOLS: HARASSMENT PUTS GAY YOUTH AT RISK, *available at* http://www.nmha.org/pbedu/backtoschool/bullyingGayYouth.pdf).

school each year,[173] which is three times higher than the national average drop out rate.[174] Additionally, gay youth are twice as likely as high school youth on the whole to anticipate not attending college.[175]

The success of the Milk School is further evidence of a rational basis for such a school. Whereas gay youth in traditional schools are far more likely to drop out of school and less likely than other students to pursue higher education, students at the Harvey Milk High School have a ninety-five percent graduation rate, and sixty percent pursue higher education.[176] The Harvey Milk School is open to all students regardless of their sexual orientation and does not exclude students on that basis.[177] Therefore, it should be easily safe from a constitutional challenge even disregarding much of the data described above.[178] As the Tenth Circuit held in *Villanueva v. Carere*, charter schools meant to increase opportunities for "at-risk pupils" will not trigger heightened scrutiny where the statute creating the schools explicitly makes enrollment open to any child living in the school district.[179] However, the statistics suggest that the problem of harassment for at-risk students is so pervasive and the harassment so specific to their real or perceived sexual orientation that even if the Milk School explicitly prohibited non-gay students from admission, a school district has a rational basis for maintaining such a school.

As the data discussed show, gay youth are far more likely to be harassed because of their sexual orientation than other students. This has led to greater absentee and dropout rates and thus lower college attendance rates among gay students. The harassment may also contribute to the higher suicide and runaway rates reported among gay youth.[180] Harvey Milk students appear uniquely situated to support an argument that gay students require different accommodations than their non-gay counterparts.

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[173] Hetrick-Martin Institute: Home of the Harvey Milk School, LGBTQ Youth Statistics, *supra* note 164 (internal citation omitted).

[174] Bethard, *supra* note 6, at 418 (citing NAT'L MENTAL HEALTH ASS'N, *supra* note 172).

[175] KOSCIW, *supra* note 163, at 23.

[176] Hetrick-Martin Institute: Home of the Harvey Milk School, F.A.Q's, *supra* note 3.

[177] *Id.*

[178] Several scholars assume that the open enrollment of the Milk School protects it from an equal protection challenge. *See, e.g.*, Maurice R. Dyson, Essay, *Safe Rules or Gays' Schools? The Dilemma of Sexual Orientation Segregation in Public Education*, 7 U. PA. J. CONST. L. 183, 195–97 (2004) (discussing equal protection claims against discriminatory school officials); Kristina Brittenham, Comment, *Equal Protection Theory and the Harvey Milk High School: Why Anti-Subordination Alone Is Not Enough*, 45 B.C. L. REV. 869, 893–94 (2004) (assuming that a school with open enrollment should pass constitutional muster).

[179] 85 F.3d 481, 488 (10th Cir. 1996).

[180] *See supra* notes 170–72 and accompanying text (discussing homeless rates and suicide rates among gay youth).

The fact that non-gay students may also face harassment in their home schools and may not have a similar option is irrelevant to whether a gay school can survive rational basis review because, as the Court said in *Lee Optical*, a legislature may remedy evils "one step at a time" and remedy some areas while "neglecting the others."[181] It is also irrelevant that there may be less extreme measures to remedy anti-gay harassment because a court will not strike down a program that pursues a legitimate interest even though the remedy "may be unwise, improvident, or out of harmony with a particular school of thought."[182] Both a school open for all and one open exclusively to gay students should survive the Court's rational basis review.

IV. THE APPLICATION OF STRICT SCRUTINY TO BENIGN MEASURES MEANT TO REMEDY ANTI-GAY DISCRIMINATION

Although most Supreme Court decisions considering the constitutionality of classifications on the basis of sexual orientation or conduct reviewed statutes discriminating against gay people, the Court's recent rulings on affirmative action programs for racial minorities or all-female institutions suggest that benign legislation is subject to the same level of scrutiny as measures discriminating against a suspect class.[183]

Benign discrimination is subject to heightened scrutiny because these group classifications are assumed to be "in most circumstances irrelevant and therefore prohibited"[184] because "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."[185] As a result, "despite the surface appeal of holding 'benign' racial classifications to a lower standard, . . . [m]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system."[186]

Because benign programs aimed at remedying anti-gay discrimination would have to withstand the same heightened scrutiny as malignant legislation, the irony is that suspect status recognition may no

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[181] Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955).

[182] *Id.* at 488.

[183] Brittenham, *supra* note 178, at 894.

[184] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)); *see also* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ("[L]aws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.").

[185] *Adarand*, 515 U.S. at 229–30.

[186] *Id.* at 226 (internal citations omitted).

longer be desirable.[187] Were gay people recognized as a suspect or quasi-suspect class, it would be more difficult for benign legislation intended to remedy anti-gay discrimination to withstand judicial scrutiny. Programs such as an exclusively gay school would be unlikely to be upheld under this level of judicial review.

A. The Application of Strict Scrutiny to Benign Legislation

Whereas rational basis review presumes the constitutionality and desirability of state legislation aimed at most groups, strict scrutiny presumes legislation to be unconstitutional unless found to be "narrowly tailored to further compelling governmental interests."[188] Heightened review is only applied to "suspect classes,"[189] such as African Americans, aliens, and other ethnic minorities, who "1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are a minority or politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right."[190] Suspect status is justified in these cases because the "factors [on which such classifications are based] are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others."[191]

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[187] *See* Brittenham, *supra* note 178, at 894–95 (arguing that the "unreasonable results" of the parallel scrutiny given to affirmative action dictate that the Harvey Milk High School be found constitutional).

[188] Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

[189] Justice Black, writing for the majority in *Korematsu v. United States*, 323 U.S. 214 (1944), stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." *Id.* at 216; *see also* Fullilove v. Klutznick, 448 U.S. 448, 486 (1980) (holding racial and ethnic classifications suspect because of the United States' historical tolerance for using such "criteria for the purpose or with the effect of imposing an invidious discrimination").

[190] High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (citing Bowen v. Gilliard, 483 U.S. 587, 602–03 (1987)).

[191] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). Noting that the purpose of the Fourteenth Amendment was to eliminate discrimination on the basis of race, the Court in *Loving v. Virginia* explained that it could not imagine a legitimate reason for legislation making "the color of a person's skin the test of whether his conduct is a criminal offense." 388 U.S. 1, 11 (1967) (quoting McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., concurring)). Racial classifications "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin*, 379 U.S. at 192; *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.").

In *Adarand Constructors, Inc. v. Pena*,[192] the Court held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[193] The Court found that remedial racial measures, in this case, giving preferences to small businesses owned by "socially and economically disadvantaged individuals"[194] in federal subcontracting bids, had to be just as narrowly tailored as measures discriminating against suspect classes.[195] Justice Thomas argued in his concurrence that "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple."[196] Although Justice Thomas's words did not appear in Justice O'Connor's plurality opinion, the reasoning behind them was present in O'Connor's assertion that "benign" classifications are equally suspect to malicious ones.[197] The idea of racial equality is linked to the ideal of a colorblind society. Only when racial categories are invisible does the Court believe racial equality has been achieved.

More recently, in *Grutter v. Bollinger*,[198] the Court reaffirmed the need for applying the strictest scrutiny to all racial classifications.[199] Justice O'Connor explained that a major purpose of the Fourteenth Amendment "was to do away with all governmentally imposed discrimination based on race."[200] The Court, after applying strict scrutiny to race-conscious admissions policies, found that the consideration of race in admissions decisions at the University of Michigan Law School was permissible, if narrowly tailored.[201] But, the Court went further by only finding race-conscious programs constitutional when they terminate "as soon as practicable."[202]

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[192] 515 U.S. 200 (1995).

[193] *Id.* at 227. In deciding *Adarand*, the Court relied on its earlier decision in *Croson*, in which strict scrutiny was applied to a remedy aimed at increasing the number of minority-owned companies receiving city contracts. *See Croson*, 488 U.S. 469.

[194] *Adarand*, 515 U.S. at 204.

[195] *See id.* at 227 ("[H]olding 'benign' state and federal racial classifications to different standards does not square with [the idea that the Equal Protection Clause protects persons rather than groups].").

[196] *Id.* at 241 (Thomas, J., concurring).

[197] *See id.* at 226 (plurality opinion) (stating that "more than good motives" are needed to warrant the use of racial classifications).

[198] 539 U.S. 306 (2003).

[199] *Id.* at 326 ("We have held that all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny. This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." (internal citations omitted)).

[200] *Id.* at 341 (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984)).

[201] *Id.* at 343.

[202] *Id.* ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

Just as benign racial classifications require the same degree of scrutiny as classifications based upon invidious discrimination, sex-based classifications, even those intended to benefit women, must withstand an intermediate level of scrutiny. The quasi-suspect status of women is justified on the grounds that there is a long history of sex discrimination in the United States, that women continue to face discrimination largely the result of historical stereotypes, and that, like race, sex is an immutable characteristic which usually has no relation to one's ability to perform or make the same meaningful contributions to society of which men are considered capable.[203]

Justice Ginsburg, writing for the majority in *United States v. Virginia* (*VMI*),[204] explained that the reason for the quasi-suspect status of women is that, whereas it is recognized that there are no inherent differences between black and white people, "[p]hysical differences between men and women . . . are enduring" and may be used "to advance full development of the talent and capacities" of women,[205] but cannot be used "to create or perpetuate the legal, social, and economic inferiority of women."[206]

In *Craig v. Boren*,[207] the Court found that prohibiting men under twenty-one from buying liquor while permitting women over eighteen to do so violated the Equal Protection Clause because it did not "serve important governmental objectives and [was not] substantially related to achievement of those objectives."[208] Since this ruling, the Court has clarified this intermediate level of scrutiny by explaining that "the proffered justification [must be] 'exceedingly persuasive.'"[209]

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[203] In *Frontiero v. Richardson*, 411 U.S. 677, 683–87 (1973), the Court explained the peculiar situation of sex classification:

> [W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to the ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

Id. at 686–87 (internal citations omitted).

[204] 518 U.S. 515 (1996).

[205] *Id.* at 533.

[206] *Id.* at 534.

[207] 429 U.S. 190 (1976).

[208] *Id.* at 197; *see also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (holding that excluding men from a publicly funded school violated the Equal Protection Clause because the exclusion did not serve "important governmental objectives" and that the exclusion of men was "substantially related to the achievement of those objectives" (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980))).

[209] *VMI*, 518 U.S. at 533 (internal citations omitted). To withstand constitutional muster, the law must serve "important governmental objectives and . . . the discriminatory means employed [must be] substantially related to the achievement of those objectives." *Id.* at 524 (quoting *Hogan*, 458 U.S. at 424).

Justice Ginsburg explained that sex-based stereotypes could not form the basis for an "exceedingly persuasive justification" when the Court held that women could not be excluded from the Virginia Military Institute in *VMI*.[210] The Institute's justifications for the exclusion of women, that single-sex education produces unique educational benefits and that the school's character development and leadership training would have to be modified if women were accepted, failed the "exceedingly persuasive justification" test.[211]

As evidenced by cases such as *Newberg v. Board of Public Education*, single-sex public schools have not fared much better than the Virginia Military Institute.[212] In *Newberg*, the court found that Philadelphia's all-female Girls High School and the all-male Central High School were materially unequal because of differences in the facilities, teacher experience, and equipment, among other factors.[213] More recently, a district court found that a Detroit public school limited to "at-risk" males could not withstand intermediate scrutiny.[214] The court in *Garrett v. Board of Education* found that there was no evidence that a coeducational school bore a substantial relationship to the difficulties faced by "at-risk" males.[215]

B. A School Exclusively for Gay Youth Would Not Likely Survive Heightened Scrutiny

In order for a gay school to survive strict scrutiny, the state would have to show that the program was "narrowly tailored" to "further compelling governmental interests."[216] To withstand intermediate scrutiny, the state would have to offer an "exceedingly persuasive justification" to explain why the challenged "classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"[217]

As discussed in Part IV.A above, only in very limited situations will the Court uphold state legislation or programs that classify on the basis of a suspect class. There exists an assumption that "[c]lassifications based on race carry a danger of stigmatic harm.

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[210] *Id.* at 556.

[211] *Id.* at 557–58; *see also* Garrett v. Bd. of Educ., 775 F. Supp. 1004 (E.D. Mich. 1991) (holding that an all-male school aimed at educating urban males was illegal because it made no showing that coeducation had led to male students' poor educational performance).

[212] 26 Pa. D. & C.3d 682 (Phila. County Ct. C.P. 1983).

[213] *Id.*

[214] *Garrett*, 775 F. Supp. at 1007-08.

[215] *Id.* at 1008.

[216] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

[217] United States v. Virginia (*VMI*), 518 U.S. 515, 533 (1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[218] And, even where a remedial measure is justified, it must be "narrowly tailored" so that programs carry the least risk of causing stigmatic harm or promoting hostility towards a suspect class. In the context of schools segregated according to race, Justice Scalia explained that race-conscious remedies should be strictly limited in the context of schools to situations in which a "dual school system" is being perpetuated and must be dismantled.[219]

Based upon the Court's reluctance to segregate on the basis of any suspect classification and the corresponding concerns about the group stigmatization that could result, an exclusively gay school is not likely to survive heightened scrutiny. This is especially true because even if the remedy were accepted as necessary by the Court, it would almost certainly be struck down as not being narrowly tailored.

First, the state would have to show that the least extreme measure which could be taken to effectively correct anti-gay harassment in schools would be to completely remove these students from their home schools. It would be very difficult to explain why adequate programs to protect gay students could not be established in their own home schools. As discussed in Part III.B above, many other courts have required school districts to offer equal protection to gay students facing harassment, and none of those districts have remedied the problem by establishing separate schools.

Second, the state would have to explain why heterosexual students facing physical and emotional harassment in these same schools are not included in the remedial program. Because the Harvey Milk School is not an exclusively gay school, it may be able to avoid this question. However, an exclusively gay school would have the more difficult task of using the data discussed in Part III.C above, to make a compelling argument that this harassment is so unique to gay youth that there exists a compelling justification for the school. Finally, the tremendous disparities in spending on students at the Milk School as

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[218] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

[219] Justice Scalia, concurring in *Croson*, wrote:

> In my view there is only one circumstance in which the States may act *by race* to "undo the effects of past discrimination": where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. . . . This distinction explains our school desegregation cases, in which we have made plain that States and localities sometimes have an obligation to adopt race conscious remedies. While there is no doubt that those cases have taken into account the continuing "effects" of previously mandated racial school assignment, we have held those effects to justify a race-conscious remedy only because we have concluded, in that context, that they perpetuate a "dual school system." We have stressed each school district's constitutional "duty to *dismantle* its dual system," and have found that "[e]ach instance of a failure or refusal to fulfill this affirmative duty *continues the violation* of the Fourteenth Amendment."

Id. at 524 (Scalia, J., concurring) (internal citations omitted).

opposed to other public schools in New York, a difference of more than three to one, would almost certainly be found not to have a "compelling justification" under an equal protection analysis.

One circumstance in which an argument for an exclusively gay school could potentially survive heightened scrutiny would require a showing that harassment of gay students is so rampant and ugly and that the current drop-out and suicide rates among these youth are so much greater than non-gay students facing similar treatment, that segregation is necessary for a temporary period of time until the school district can test and implement programs that will adequately address the state's failure to protect students.[220] Just as Justice O'Connor placed a durational limit on the amount of time that race could be considered as a factor in law school admissions in *Grutter*,[221] so too might a court recognize the level of harassment faced by gay youth to be a sufficient enough "crisis" as to require the establishment of a temporary or short-term gay school while the district develops alternative, less extreme long-term measures.

The Court has been similarly reluctant to find single-sex schools constitutional under intermediate scrutiny. Concerns that female students have been stigmatized, stereotyped, and assumed to be unable to perform at the same level as their male colleagues have led the Court to strike down both all-male and all-female schools. The Court's opinions in *VMI* and earlier cases considered under intermediate scrutiny discussed in Part IV.A above suggest that it would be unlikely to find an "exceedingly persuasive" justification for a school exclusively devoted to gay students, especially if the school would have the effect of "creat[ing] or perpetuat[ing] the legal, social, and economic inferiority" of the quasi-suspect group.[222]

Perhaps only if Justice Rehnquist's thirty-year-old dissent in *Boren*[223] was controlling would an exclusively gay school survive intermediate scrutiny. Arguing that intermediate scrutiny should not have been applied to a case in which a law prohibiting men under twenty-one from purchasing alcohol while allowing women over eighteen to

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[220] Norman Siegel, former Executive Director of the New York Civil Liberties Union, argues that because the Harvey Milk School educates fewer than 200 children and there are thousands of gay students in the city's schools, the school district should "take on institutional homophobia" and create stronger programs throughout the city's schools. Herszenhorn, *supra* note 17, at A12 (quoting Norman Siegel). Although Siegel has a valid point, he may overlook the immediate threat of harm posed to certain students if left in their current schools. Institutional change often takes years, if not decades. And his statement further overlooks the fact that the Milk School is not intended for all gay students, but for those who are most at risk for harassment or peer- or self-inflicted harm.

[221] *See* 539 U.S. 306, 310 (2003) (suggesting a twenty-five-year limit for consideration of race in admissions).

[222] *VMI*, 518 U.S. at 534.

[223] 429 U.S. 190 (1976).

do so was invalidated, Rehnquist stated that men were not victims of a history of discrimination.[224] He wrote that "[t]here is no suggestion in the Court's opinion that males in this age group are in any way peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts."[225] The Court, Justice Rehnquist argued, should apply heightened scrutiny only to situations in which discrimination against women was at issue.[226] Here men were the sole objects of the discrimination, he suggested.[227] If this dissent was controlling, heterosexuals challenging an exclusively gay school, like men in *Boren*, would not be subject to heightened scrutiny. However, Justice Rehnquist's dissent has never been adopted and the Court has shown an even greater willingness to apply heightened scrutiny to legislation meant to discriminate against either men or women, since *Boren* was decided in 1976.[228]

V. THE DESIRABILITY OF RATIONAL BASIS REVIEW OF SEXUAL ORIENTATION-RELATED LAWS TODAY

Although a strong argument can still be made in favor of granting suspect status to gay people, the numerous arguments that may be made against suspect status today reflect the fact that many advances have been made by gay people in the two decades since the Court affirmed the constitutionality of same-sex sodomy laws in *Bowers v. Hardwick*.[229] States and municipalities today are passing legislation and implementing programs to benefit gay people in many areas of law. As of 2005, a majority of gay Americans are protected from discrimination in areas such as private employment and against hate-motivated crimes.[230] Such advances suggest that the struggle for gay equality may be reaching a crossroads in which homophobic attitudes are beginning to lose in the court of public opinion. As such, although suspect status would remain an effective tool for protecting groups in states and localities in which change is occurring more slowly, the desirability of suspect status must be considered in light of the impact strict scrutiny would likely have on benign classifications. Because the Court is more deferential to state and local legislative

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[224] *Id.* at 218–19 (Rehnquist, J., dissenting).

[225] *Id.* at 219.

[226] *Id.* at 219–20.

[227] *Id.*

[228] *See supra* Part IV.A (describing application of heightened scrutiny to all sex-based classifications).

[229] 478 U.S. 186 (1986) (finding that heightened scrutiny did not apply to homosexuals in holding that the Fourteenth Amendment did not confer a fundamental right on gay people to engage in sodomy).

[230] *See infra* notes 262–65 and accompanying text.

programs under rational basis review, today less judicial intervention may be preferable to more.

A. *The Case for Suspect Status Today at a Crossroads*

An argument can almost certainly be made for granting suspect status to gay people. The Court considers several factors in determining whether a group constitutes a suspect class. First, the group must have a history of purposeful discrimination.[231] Second, the Court considers whether the discrimination faced by the group is so unfair as to be invidious.[232] Determining whether the discrimination is invidious requires consideration of whether a classification on the basis of the suspect status relates to a person's ability to contribute to society, whether the classification is reflective of stereotypical or prejudicial attitudes, and whether the class is defined by an immutable trait.[233] Finally, the Supreme Court considers whether the burdened group lacks power to seek redress from the other branches of government.[234]

The Ninth Circuit, sitting *en banc* in 1988, made a strong argument that gay people constitute a suspect class in *Watkins v. United States Army*.[235] The court first described a history of discrimination against homosexuals in both public and private spheres. It noted that many states prohibited gays from "certain jobs and schools, and have prevented homosexuals [from] marriage."[236] In the private sector, gays have been discriminated against in hiring, housing, and in houses of worship.[237]

However, it is unclear whether anti-gay discrimination would satisfy the "history of discrimination" prong in light of Justice Scalia's opinion in *Washington v. Glucksberg*.[238] He stated that a fundamental right must be "deeply rooted in this Nation's history and tradition."[239] However, in its discussion regarding the right to same-sex sodomy,

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[231] Watkins v. U.S. Army, 875 F.2d 699, 724 (9th Cir. 1989) (en banc) (citing City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985)). The *Watkins* court referenced the factors applied by the United States Supreme Court. The factors discussed are not unique to the Ninth Circuit.

[232] *Id.* at 724.

[233] *Id.* at 724–25. The Ninth Circuit explained that courts have never suggested that "immutability" be so strictly defined as to mean that the trait cannot be physically changed. The court gives the example that gender is considered immutable even though a woman, for example, could have an operation to become a man. *Id.*

[234] *Id.* at 726.

[235] *Id.* at 728.

[236] *Id.* at 724.

[237] *Id.*

[238] 521 U.S. 702 (1997).

[239] *Id.* at 721 (internal quotations omitted).

the *Lawrence* majority noted that sexual identities did not emerge until the end of the 19th century,[240] and that laws specifically focused on homosexual conduct did not arise until recently.[241] This does not dispose of the fact that discriminatory actions such as raids on gay establishments,[242] the prevalence of hate-motivated crimes by private citizens,[243] and the exclusion of gay people from participation in clubs and governmental bodies such as the military[244] have been widespread over the course of recent history. However, it raises questions as to whether the history prong of the suspect status can be met.

With reference to the second factor, whether the group has been treated so unfairly that the discrimination is invidious, the court in *Watkins* noted that sexual orientation is irrelevant to one's contribution to society. The court cited the fact that the plaintiff—a military sergeant who had been informed that he would be discharged from the military because of his homosexuality—had an "exemplary" military record.[245] The irrelevance of sexuality to one's ability to contribute to society suggested to the court that sexual orientation-based classifications had to be based on prejudice and stereotypes.[246]

The issue of "immutability" is more controversial today because there is disagreement as to whether homosexuals have an "immutable trait." The Ninth Circuit noted that the "immutability" factor has never been construed strictly, citing the fact that people can have surgical operations to change their sex, aliens can become citizens, illegitimate children can be legitimated, and people of color can "pass" as white.[247] But the immutability of sexuality remains a point of public and scientific debate. A 2003 CBS News/New York Times poll showed that forty-four percent of respondents believed homosexual-

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[240] Lawrence v. Texas, 539 U.S. 558, 568 (2003).

[241] *See id.* ("[T]here is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."). For historical backgrounds of the construction of sexual identities in the United States, see, for example, JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA (1988) (offering a general history of sexuality in America); DAVID F. GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY (1988) (considering the social construction of sexuality); JONATHAN KATZ, THE INVENTION OF HETEROSEXUALITY (1995) (arguing that sexuality is a recent historical construction).

[242] *See* GEORGE CHAUNCEY, GAY NEW YORK, 1890–1940 (1995) (examining the history of vice squads and raids of gay bars in late-nineteenth and early-twentieth century New York).

[243] *See* HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN (Gregory M. Herek & Kevin T. Berrill eds., 1992) (discussing the history and extent of anti-gay motivated hate crimes).

[244] *See generally* ALLAN BÉRUBÉ, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO (1990) (describing the repression of homosexuality in the U.S. military); RANDY SHILTS, CONDUCT UNBECOMING: GAYS & LESBIANS IN THE U.S. MILITARY (1993) (describing the military's ban on gay people serving in the military).

[245] Watkins v. U.S. Army, 875 F.2d 699, 725 (9th Cir. 1989).

[246] *Id.*

[247] *Id.* at 726.

ity was a choice, while another forty-four percent believed it was not something that could be changed.[248] Scientists continue to research whether sexuality is a biology-based trait or a choice, whether unconscious or not.[249]

As for the final factor, whether gay people are a politically powerless group, the *Watkins* court noted that "social, economic, and political pressures to conceal one's homosexuality operate to discourage gays from openly protesting anti-homosexual governmental action."[250] The court further noted that even those who are openly gay often face animus and thus their ability to participate effectively in politics is limited.[251] More so, elected officials often have difficulty empathizing with homosexuals.[252] Today, however, it can be debated whether or not gay people are politically powerless—especially depending on how one measures group political power. Responding to this question in his *Romer* dissent, Justice Scalia argued that it was "preposterous" to refer to gay people as politically powerless, since even though gays made up only four percent of the population, they had "enormous influence in American media and politics," as evidenced by the fact that forty-six percent of voters in Colorado voted against Amendment 2.[253]

At the national level, it may be argued that gay political power is limited. Polls show that gays constitute approximately four to five percent of the national vote.[254] Only three of 435 Congressmen (less than one percent),[255] and no U.S. Senators,[256] are gay. Gay advocates have been unsuccessful in getting federal legislation to remedy discrimination passed and unable to counter anti-gay legislation such as the Defense of Marriage Act ("DOMA").[257] However, it can also be argued that these failures are not the result of powerlessness, but of the concentration of gay votes behind Democratic Party candidates.

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[248] *Opposition to Gay Marriage Grows*, CBS NEWS, Dec. 21, 2003, http://www.cbsnews.com/stories/2003/12/19/opinion/polls/main589551.shtml. The poll was conducted from a nationwide sample of 1057 adults with a three percent margin of error. *Id.*

[249] For an overview of this debate and references to studies and articles considering the question, see Ryan D. Johnson, *Homosexuality: Nature or Nurture*, ALLPSYCH J., Apr. 30, 2003, http://allpsych.com/journal/homosexuality.html (describing the debate about the roots of homosexuality).

[250] *Watkins*, 875 F.2d at 727.

[251] *Id.*

[252] *Id.*

[253] Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).

[254] Paul Johnson, *Queer as Folk Star Hits the Road for Kerry*, 365GAY.COM, Oct. 19, 2004, http://www.365gay.com/newscon04/10/101904qafElect.htm.

[255] Deb Price, *Elected Officials Put Human Face on Gay Issues*, DETROIT NEWS, June 7, 2004, at 7A.

[256] *Id.*

[257] *See infra* note 270 (describing law defining marriage as between one man and one woman).

Gay voters support Democratic Party candidates by a three to one margin.[258]

At the statewide and local levels, especially in large urban areas, gay voters are more highly concentrated. For example, gay voters make up approximately nine percent of voters in large cities, seven percent in smaller cities, and fewer in more rural areas.[259] This may have an influence on gay rights advocates' ability to make gains in terms of pro-gay legislation in areas in which gay voters are more numerous. It would be difficult to argue that gay people lack access to political channels in those states and municipalities in which they are most centered. However, this is not necessarily true in more rural areas or in certain regions of the country.[260] And, despite the nearly one million elected positions in the United States, only 275 elected officials were openly gay in 2004.[261]

The above analysis shows that although a suspect class status argument can be made for gay people, some advances in gay rights suggest that suspect status is less necessary than it was only two decades ago.

B. Limited Judicial Intervention in Benign Programs

Limited judicial intervention in state and municipal laws may prove more desirable to gay rights proponents from a policy standpoint, because protections from discrimination on the basis of sexual orientation or gender identity are not coming from federal statutes, but rather from state and local governments. Heightened scrutiny of these laws would threaten legislation protecting a majority of Americans from anti-gay discrimination in the absence of federal recognition of gay rights.

A majority of Americans are currently protected from discrimination on the basis of sexual orientation in private employment under state and local legislation. Seventeen states and the District of Co-

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[258] *See* NATIONAL GAY AND LESBIAN TASK FORCE, DEMOGRAPHIC VOTING BLOCS IN PRESIDENTIAL ELECTIONS, 2000 VS. 2004, *available at* http://www.thetaskforce.org/downloads/PresidentialDemographics2004.pdf (last visited Mar. 3, 2006) (demonstrating that seventy-seven percent of gays, lesbians, or bisexuals voted for the Democratic Party presidential candidate in 2004 as compared with twenty-three percent voting for the Republican Party presidential candidate). Voters were not asked whether they identified as transgender in this poll. *Id.*

[259] Johnson, *supra* note 254.

[260] Gay rights protections are less prevalent in areas such as the southern United States and less populated areas. *See infra* Part V.B for a discussion of state and local legislation.

[261] Price, *supra* note 255, at 7A. For a complete and up-to-date list of gay elected officials, see GAY & LESBIAN VICTORY FUND, OUT OFFICIALS, http://www.victoryfund.org/index.php?src=directory&view=outelected (last visited Feb. 3, 2006).

lumbia,[262] representing approximately forty-one percent of the American population,[263] have private employment nondiscrimination laws. At least another fourteen percent of Americans are similarly protected under county or municipal law.[264] Another thirty-two states and the District of Columbia have also passed hate crime laws that explicitly include anti-gay motivated crimes among covered hate crimes.[265]

On the other hand, the federal government does not provide any of the protections offered by the above states. There is no federal ban against private employment discrimination on the basis of sexual orientation,[266] nor are anti-gay crimes covered by the federal hate crimes law.[267] And as of December 2005, the federal government continues to prohibit openly gay people from serving in the U.S. military.[268]

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[262] These include California, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Washington, and Wisconsin. Eight of these states explicitly protect workers from private discrimination on the basis of gender identity. NATIONAL GAY AND LESBIAN TASK FORCE, STATE NONDISCRIMINATION LAWS IN THE U.S., Jan. 2006, *available at* http://www.thetaskforce.org/downloads/nondiscriminationmap.pdf.

[263] *See* UNITED STATES CENSUS BUREAU, UNITED STATES CENSUS 2000, *available at* http://www.census.gov/population/cen2000/tab04.txt (listing the populations of each state in the United States).

[264] *See* WAYNE VAN DER MEIDE, POLICY INSTITUTE OF THE NATIONAL GAY AND LESBIAN TASK FORCE, LEGISLATING EQUALITY: A REVIEW OF LAWS AFFECTING GAY, LESBIAN, BISEXUAL, AND TRANSGENDERED PEOPLE IN THE UNITED STATES 11 (2000), *available at* http://www.thetaskforce.org/downloads/legeq99.pdf (analyzing the percentage of Americans covered by county or city anti-discrimination laws in private employment as of 1999). The most recent compilation lists these counties and cities as of 1999. Population changes after the 2000 Census and the passage of additional protections since 1999 suggest that this number may be higher today.

[265] NATIONAL GAY AND LESBIAN TASK FORCE, HATE CRIME LAWS IN THE U.S., *available at* http://www.thetaskforce.org/downloads/hatecrimesmap.pdf (last visited March 3, 2006).

[266] Title VII of the Civil Rights Act of 1964 does not include protections against employment discrimination on the basis of sexual orientation. *See* 42 U.S.C. § 2000e-2(a)(1) (2000) (limiting protection to discrimination on the basis of "race, color, religion, sex, or national origin"). The proposed Employment Non-Discrimination Act (ENDA) would add "sexual orientation" as a prohibited basis for discrimination. *See* Human Rights Campaign, Summary: What Does ENDA Do and Not Do, http://www.hrc.org/Template.cfm?Section=Background_Information&CONTENTID=13309&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited Nov. 10, 2005) (describing the bill proposed in the 109th Congress).

[267] *See* 18 U.S.C. § 245 (2000) (providing no reference to sexual orientation in the federal hate crimes law). The proposed Local Law Enforcement Hate Crimes Prevention Act of 2005, which includes protection against discrimination on the basis of sexual orientation and gender identity, passed the U.S. House of Representatives on Sept. 14, 2005. *See* Human Rights Campaign, Local Law Enforcement Enhancement Act, http://www.hrc.org/Template.cfm?Section=Local_Law_Enforcement_Enhancement_Act&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=23&ContentID=13493 (last visited Nov. 10, 2005) (describing the hate crimes legislation which passed the House by a 223-199 vote).

[268] *See* Human Rights Campaign, Military Readiness Enhancement Act, http://www.hrc.org/Template.cfm?Section=Military_Readiness_Enhancement_Act&Template=/TaggedPage/

Same-sex marriage rights have been overwhelmingly rejected by state legislatures and voters in recent years. Many states responded to Massachusetts' 2003 legalization of gay marriage by passing legislation or placing referendums on the ballot to constitutionally prohibit same-sex marriage.[269] However, here too, the federal government has proven equally, or even more unlikely, to intervene on behalf of same-sex couples. Years before the recent onslaught of state-led initiatives aimed at prohibiting same-sex marriages, the federal government overwhelmingly passed the Defense of Marriage Act. It defined marriage as a "union between one man and one woman as husband and wife," and said that no state has to recognize a same-sex relationship "that is treated as a marriage."[270]

Despite the rejection of same-sex marriage rights by numerous states, five states (in addition to Vermont, whose civil union law preceded the Massachusetts decision) have adopted some form of statewide same-sex partnership rights since Massachusetts legalized gay marriage.[271] Connecticut and Vermont currently allow same-sex civil unions with all of the states' spousal rights.[272] California has domestic partnerships for both gay and non-gay unmarried couples, providing nearly all state-level spousal rights, and Hawaii, Maine, and New Jersey provide some spousal rights to unmarried couples.[273]

Therefore, even on an issue as divisive as same-sex marriage, in which states have overwhelmingly rejected such a right, the fact that seven states now recognize same-sex couples as having the same or similar rights as opposite-sex couples suggests that state and local laws are more likely to advance gay rights than federal legislation. Today, as states and municipalities serve as the source of legislation to provide equal rights to gay people and to create programs to remedy anti-gay discrimination, it is politically pragmatic for gay rights advocates to favor less judicial scrutiny of sexual orientation-related legis-

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TaggedPageDisplay.cfm&TPLID=23&ContentID=27727 (last visited Nov. 10, 2005) (describing a proposed bill to repeal the military's "Don't Ask, Don't Tell" policy).

[269] In 2004, Arkansas, Georgia, Kentucky, Louisiana, Michigan, North Dakota, Ohio, Oklahoma, and Utah passed constitutional amendments banning same-sex marriage, and in 2005, Kansas and Texas did as well. *See* NATIONAL GAY AND LESBIAN TASK FORCE, ANTI-GAY MARRIAGE MEASURES IN THE U.S., *available at* http://www.thetaskforce.org/downloads/marriagemap.pdf (last visited Feb. 26, 2006) (providing a map that shows which states have passed statutes or constitutional amendments outlawing gay marriage).

[270] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1736C (2000)).

[271] *See* HUMAN RIGHTS CAMPAIGN, RELATIONSHIP RECOGNITION IN THE U.S., http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=16305 (last visited Nov. 10, 2005) (displaying which states have passed some form of same-sex partnership rights).

[272] *Id.*

[273] *Id.*

lation rather than the heightened scrutiny which would be required if gay people were recognized as a suspect class.

CONCLUSION

The Harvey Milk High School represents the first attempt by a city to resolve the rampant physical, verbal, and emotional harassment experienced by gay students through the establishment of a "safe" school, limited to those students who cannot succeed in a community school setting. Consideration of the Milk School's constitutionality under the various tiers of judicial scrutiny suggests that rational basis review may better serve the goals of gay rights advocates than would the application of heightened scrutiny.

Today, more than ever before, states and municipal governments are passing legislation and implementing programs such as the Milk School to benefit gay people and remedy anti-gay bias. State and local statutes protect more than half of gay Americans from employment discrimination and hate-motivated crimes. Seven states also have some form of same-sex partnership recognition. Because the federal government does not provide similar rights, states and local jurisdictions remain the sole source of legal protections for gay people.

Such advances raise doubts about the long-held belief that suspect status recognition would best serve the goals of gay rights advocates. One of the ironies of heightened scrutiny in the Supreme Court's equal protection jurisprudence, as evidenced by the Court's rulings on programs intended to benefit suspect classes, is that while recognition of a suspect class is certainly useful in battling malicious discrimination, it also has the potential to harm the suspect group at a time when governmental bodies are beginning to pass legislation meant to counter the effects of anti-gay bias. Benign programs meant to remedy discrimination are far less likely to survive strict scrutiny than rational basis review. The application of strict scrutiny does not make it impossible for such legislation to withstand review, but it certainly makes it much more difficult as described in the case of an exclusively gay school.

This is not to suggest that the days of anti-gay legislation are gone or that rational basis review would be preferable to strict scrutiny if reviewing only malicious legislation. But, after *Romer* and *Lawrence*, moral disapproval and the bare desire to harm gay people appear to be insufficient justifications for legislation classifying on the basis of sexual orientation. Because measures aimed at hurting gays will almost never be based on anything more than moral disapproval, such measures should subsequently fail under *Romer* and *Lawrence*'s rational basis analysis, making strict scrutiny less necessary to cure anti-gay bias than it was in the past.

Although rational basis review is not the perfect solution to the cause of remedying anti-gay bias in the United States, changing public opinion and governmental action in the area of gay rights suggests that anti-gay statutes are giving way to more benign reforms in many areas of legislative decision-making. Because benign legislation is more likely to pass muster under rational basis review, perhaps the benefits of suspect class recognition for gay people no longer outweigh the potential negative effects. Maybe rational basis scrutiny is actually the more desirable method of judicial review for those seeking to protect programs such as the Harvey Milk High School.